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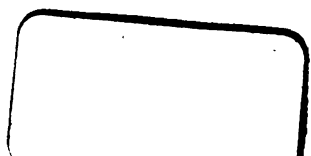
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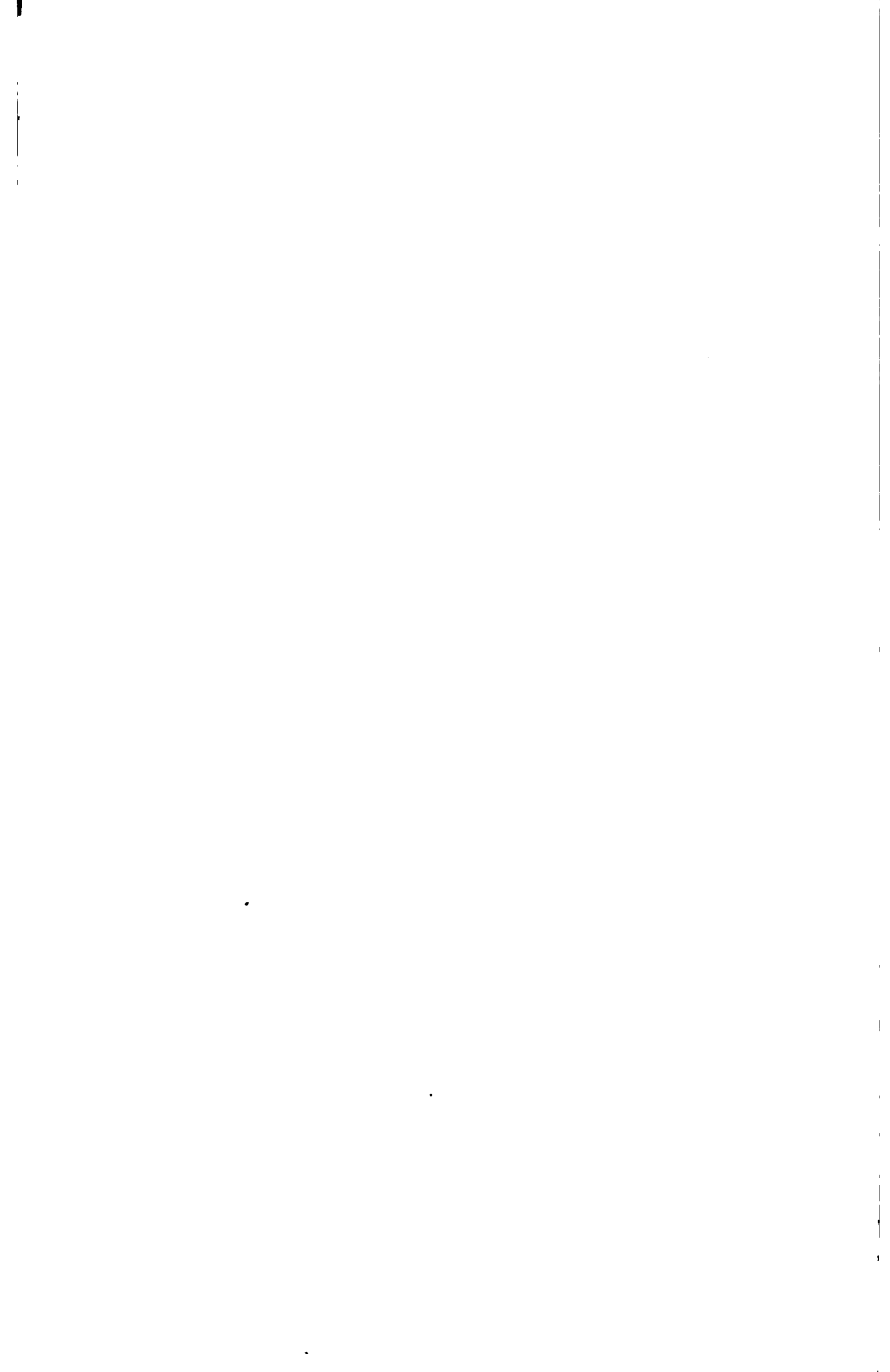
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Commentaries

ON

THE LAW OF NATIONS.

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COMMENTARIES

ON

THE LAW OF NATIONS.

BY

WILLIAM OKE MANNING.

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A New Edition,

REVISED THROUGHOUT, WITH SUPPLEMENTARY MATTER, BRINGING
THE WORK DOWN TO THE PRESENT TIME,

BY

SHELDON AMOS, M.A.,

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"An English Code," &c., &c.*

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PREFACE TO THE FIRST EDITION.

PUBLISHED IN 1839.

THE want which I have myself experienced of a work similar to the present, induces me to hope that I may assist the progress of other students engaged in the same pursuits, and so escape the blame of adding to the catalogue of useless books. It is indeed singular that, in the multiplicity of works which are published on almost every subject, we have never had a systematic treatise on the Law of Nations by an English writer. There are two productions on this subject in our language, both of which I should be proud to claim as belonging to our literature, but both are written by Americans. Of these works I shall speak further when examining the literature of the science, merely observing here that, though both excellent in their way, the scope of these writers has been too different from mine to accomplish the purpose which I have in view; Chancellor Kent merely giving a few chapters of his *Commentaries on American Law*, to the subject of the Law of Nations; and the recent work of Dr. Wheaton being professedly elementary, and certainly the best elementary book on the topic that exists.*

We have in our literature several works on different subjects relating to the Law of Nations. Rutherford,

* It will appear subsequently that a much higher estimate is due to the recent editions of these works.

Ferguson, and others, have treated of the Laws of Nature, as they should govern the intercourse of States; and on the questions of neutral commerce we have the excellent works of Lord Liverpool, Mr. Ward and Dr. Croke. It is curious too, that England may be considered as the cradle of a science, which we have yet so little cultivated in its maturity,—Albericus Gentilis, a foreign refugee who was domesticated, and who wrote, in England, being the first writer on the Law of Nations whose treatises have any claim to notice: and Dr. Zouch, who wrote immediately after Grotius, expounded in different treatises various parts of the Law of Nations, in a manner that had a better application to practice than the same divisions of his acknowledged leader.

The fact of the systematic writers on the Law of Nations having been all foreigners, is, I think, chiefly attributable to the similarity of the method of studying the Law of Nations, and that adopted in the study of the Roman Law, the basis of jurisprudence on the continent. A constant reference to general principles, and a deduction of the details of practice from abstract propositions, characterise the determinations of the Roman Law and of the Law of Nations. But, to whatever the mental habit may owe its origin, I believe that no one conversant with the political writings of the continent will deny, that a tendency to refer to general principles marks foreign discussions of political questions, while an impatience of abstract propositions characterises English debating. Yet it is to the former description of reasoning that recourse must be had in discussions on the Law of Nations. The case of Scotland may be objected to me, as a country where the Roman Law is still in some measure the study of the bar, while the Scotch bar has produced no treatises upon the

Law of Nations. But the absence of a resident court in Scotland during two centuries, has removed the cognizance of international questions to the English seat of legislature: and I think that as far as Scotland proves anything, it is in favour of the above observations, as the love of abstract reasoning is more common among the Scotch than among the English, being, as on the continent, co-existent with the habits of the study of the Roman Law, if it be not the consequence of that study.

We have works on parts of the Law of Nations, by two writers, who, at one period of their lives, contemplated publishing complete treatises on this subject. The first of these is Sir James Mackintosh, who has left, to all who are acquainted with his writings, the regret which he himself felt and expressed that he did not leave behind him greater results as the monuments of his labours. It is unfortunate that the influence which he held in his own time, has not been perpetuated to a future age by greater published records of his genius, those which exist being nearly all fragmentary. Sir James Mackintosh writes, in his correspondence, of regarding the composition of a great work on morals as "the final cause of his being." A short essay, published in an Encyclopedia, is all that he has left us of this great intention. In the earlier part of his career he delivered a course of lectures on the Law of Nature and Nations. A pamphlet of a few pages, containing the introductory lecture, and a few passages quoted in his memoirs, are the only published relics of these labours. From the sketch of his method given in his introduction, his lectures must have embraced the whole scope of political equity, commencing with the foundations of universal morality, and applying the injunctions derived from that source to the duties of a State to its subjects, of subjects

towards each other, and finally of independent States as connected in their various relations of war and amity. Had Sir James Mackintosh, in his later years, given the matured powers of his mind to the pursuit of such inquiries, the result must have been most valuable. His study of the philosophy of morals would have well fitted him for that branch of the Law of Nations which depends on the abstract principles of equity, while his knowledge of history would have richly supplied him with facts for that branch which is elucidated by induction, and the charms of his eloquence would have enabled him to make a study engaging which is not usually regarded as interesting, even among politicians. In those of his speeches in Parliament, in which he discussed international questions, he displayed the enlarged grasp of mind, comprehending alike the near and the remote bearings of his subject, which marks the statesman as distinct from the politician of the day: and seldom has a man appeared in public life who has derived such practical benefit from abstract studies; his various opinions seemed separate parts of one whole system, of which the principles were so sound, that the deductions referred to them bore the double test of consistency with theory and utility in application, his principles illustrating, not interfering with, a far-sighted expediency: and he was at once dispassionate in the pursuit of truth, and eager in its assertion when it was discovered. What a loss, that of the labours of such a mind, so expressly adapted to instruct mankind in political morality, which he himself felt to be his particular vocation, nothing should be left but unfinished fragments. But in morals, as in physics, momentum depends on the joint influence of the weight of the material, and the impulse with which it is propelled, and the powers of Sir James Mackintosh's really great mind have been attended with most incommensurate results, from

a want of energy to force those powers into action. Yet the fragments which he has left behind will still vindicate to a future age the deservedly high rank which he held among his contemporaries, for they show him to have united high capacity with the highest character, and to have constantly had, for the proposed end of his labours, that noblest intent of human genius, the improvement of his fellow-men.

The other author to whom I refer, is still, and will I trust long continue, a living writer, Mr. Ward, who has long deserted the less interesting discussion of law, to "teach truth through the medium of fiction," and who is known to a most extensive circle of readers by his delightful novels.* His essays, published nearly forty years ago, on the questions of neutral commerce, leave little to desire on the topics which they embrace, excepting such additions as the experience of later times suggests; and his treatise on the Law of Nations as existing previous to the time of Grotius, is the most interesting book on the Law of Nations that I have ever met with. It is merely an introduction to the science, but it makes the reader regret that the same author did not complete an entire treatise on the subject, which Mr. Ward, in his preface, declares it to have been at one time his intention to have written, under the title of "A Treatise of Diplomatic Law." It might be difficult to trace, in the strict reasoning of the essays on neutrality, any germs of the powers which have since been so happy in the creations of fancy, but in the Introductory Treatise we find the same tendencies directing both productions. In this treatise, as in his novels, Mr. Ward supports the dictates of an exalted morality by the invaluable, and in my opinion necessary, confirmation

* Mr. R. P. Ward died in August, 1846, aged 81.

of revealed religion; and in his Treatise, the lover of romance is shewn, in the fondness with which he lingers over the dreamy charms with which fancy has invested the days of chivalry. Not that Mr. Ward conceals the barbarism of those times, which had indeed much influence in instituting chivalry itself, part of the duties of which were those of a rude police, made necessary by the grossness of the times and the difficulty of redress; but, in common with every youthful mind, Mr. Ward dwelt with most delight on those passages of history which tell of the results of individual effort and enterprise, as contrasted with these later times when almost everything seems to be done by bodies of men; and in thinking of the days of chivalry, a little confusion results from our conveying feelings arising from the present state of civilization, and which did not then exist, to a period when certainly the generous and heroic parts of our nature were more constantly in action. In tracing the faint observance of the Law of Nations maintained in those times, Mr. Ward gives most interesting illustrations from that debateable ground between history and romance, where fancy illumines the haze which inquiry attempts to dispel. I do not wonder at the interest he found in such pursuits; I only regret that his labours ceased there, and that he did not continue his inquiries to the extent to which he himself once proposed, and which his studies so well qualified him to make at once valuable and interesting. Had either Mr. Ward, or Sir James Mackintosh, completed their purposed labours, there would have been no occasion for the present treatise, which would have been superseded by productions that, with no feigned diffidence, I feel must have been more valuable.

There was also another of our countrymen who, like the two above-named authors, once conceived the design

of writing a complete treatise on this subject, and who, like them, never carried his intention into effect; this was Fettiplace Bellers, of whose name I was ignorant, till, in a German catalogue, I found mention of his "Delineation of Universal Law," which I have since perused. It is a very curious production. It can hardly be called a book, being merely a table of the contents of a proposed treatise, and containing nothing but the heads of divisions under which Bellers proposed to write a work on Universal Law. He had been engaged on this work for twenty years, according to the advertisement, which tells us that "his design was to connect the separate systems of Lawyers and Philosophers, by deducing an entire body of laws from principles of truth and knowledge; without leaving practice wholly out of sight, nor yet carrying it down to the minuter reasonings of the bar, bench, senate, &c. of particular States: but he did not live to finish it." All that he has left behind him is a scheme which can do nothing more than serve as a plan for the inquiries of future students. His plan for the study of the Law of Nations is very good; comprehending in its scope all the most interesting questions of that law. Fettiplace Bellers, we are informed, was assisted in his task by several of the literary authorities of the day, but his papers were left in a state that was unintelligible to any one but their author, and at his death no use whatever could be made of them. It is with a feeling of regret, mingled with something like reproach, that we find the labours of twenty years so wasted, and reflect upon the great expenditure of time and diligence that has thus been destitute of any useful result.

It is partly warned by these examples, that I have determined now to publish the ensuing treatise. The study

of the Law of Nations has for some years formed the favourite occupation of my leisure, but the increasing urgency of the necessary engagements of life sadly curtails my opportunities of continuous investigation; and were I to forego the present occasion of giving a definite shape to the results of my inquiries, it is very probable that the power of doing so might escape me altogether. It is with a hope that my studies may prove of some utility, tempered by a sense that my work might be improved were I possessed of greater leisure, that I now issue these pages. At all events the time which the research necessary for the following work has occupied may be saved to those who in future pursue the same inquiries. I know of nothing in my pages to draw down the illiberality of unfair criticism, and, with regard to those who may take the trouble to set me right in any circumstance wherein I am mistaken, I have that love for the science which enables me truly to adopt the words of Grotius, "*non illi promptius me monebunt errantem, quam ego monentes sequar.*"(1)

(1) *De Jure*, Prol. § 61.

PREFACE

TO THE PRESENT EDITION.

WHEN the First Edition of this work was published in 1839, very little attention could be obtained for questions relating to the Law of Nations. We were then only twenty-four years from the Battle of Waterloo, only three years more than we now are from the Battle of the Alma. England was still buoyant with the renown of her great military successes, her maritime supremacy was incontestable, and, to recall Canning's noble figure, she was reposing on the shadow of her power. The convulsions, and the still greater risks, of 1830 and 1831, had failed to produce any general belief that greater difficulties than diplomacy would easily reconcile, were likely to disturb the general settlement of the Congress of Vienna. Many men, not fanatics, believed that the era of great wars had passed, and that there was no occasion for devoting time to the consideration of International questions. So lately as 1853 Dr. Whewell wrote of "that noble ideal of the lovers of mankind,—a perpetual peace." He trusts "that all students and professors of International Law will consider themselves as labouring upon a problem which is still unsolved, while war exists."* And in his munificent foundation of a professorship, and scholarships, of International Law at Cambridge, Dr. Whewell expressly enjoined that the professor is "to make it his aim, in all parts of his treatment of the subject, to lay down such

* In his Preface to the translation of Grotius, pp. xii, xiii.

rules, and to suggest such measures as may tend to diminish the evils of war, and finally to extinguish war between nations."

Such benevolent aspirations have been rudely dispelled by the experiences of recent years. Wars of unexampled magnitude and fierceness have broken out with a suddenness almost unknown in previous history. The Crimean War, of 1854, was the last that was preceded by the old preliminaries of negotiation, and friendly attempts to reconcile the opposed governments. The Italian War, of 1859, burst upon Europe with a violent surprise, and a campaign of a few weeks sufficed for the humiliation of Austria, and in its subsequent consequences resulted in that Free Italy which had been the dream of so many of the noblest minds from Petrarch downwards. Then the American War, of 1860, broke out, and was waged by a people generally supposed to be essentially unmilitary, with a fury, a force of numbers, and a profuseness of bloodshed, almost without precedent in the greatest European struggles. The War of 1866 was another example of a huge contest breaking out with great suddenness, and carried to an overwhelming completion after a very brief interval. Finally the gigantic struggle of 1870 was the climax of modern European warfare, in the abruptness of its commencement, the enormous slaughter of its battle-fields, the unparalleled result of its victories, and the military and political problems of which it has opened a new era.

It is probably in a great degree owing to these occurrences that much greater attention has lately been paid to questions of International Law than was formerly the case. Before this period Mr. Reddie had published, at Edinburgh in 1841, his *Historical View of the Law of Maritime*

Commerce; followed in 1844 by the same author's *Researches Historical and Critical in Maritime International Law*. Both these works are valuable and learned disquisitions, especially in giving as full an insight as can now be obtained into the history of the earlier maritime codes, such as the Rhodian Laws, the Consolato del Mare, and others. Mr. Reddie writes that he had intended to bring his work down to the Peace of 1815, but he has only brought it down to the Peace of 1802. From the manner in which he has so far fulfilled his task, it is to be regretted that Mr. Reddie was unable to carry his work to its proposed completion.

In 1849 and 1850 Mr. Wildman published his *Institutes of International Law*, a very useful work, especially from the copious references which it gives to the decisions of our Courts up to that period.

In 1856 was published, at Cambridge, Mr. Kennedy's very interesting *Essay on the Influence of Christianity on International Law*, which had obtained the Hulsean Prize in 1854.

Next comes the highly important work of Sir Robert Phillimore, now Judge of the Court of Admiralty,—*Commentaries on International Law*, in four volumes. The third volume, first published in 1857 and re-published in 1873, contains a masterly exposition of the Laws relating to Belligerents and Neutrals, though with some opinions differing from those of most writers, on a few controverted questions which will be subsequently noticed.

In 1861—1863 Sir Travers Twiss published, at Oxford, his work in two volumes on the *Law of Nations*, a valuable contribution to the study of the subject. A new edition of the second volume of the work is just announced.

Besides various essays on detached questions of International Law, there has been recently published, in 1874, the work of Mr. W. E. Hall on the *Rights and Duties of Neutrals*, a very able and complete treatise.

In America the work of Dr. Wheaton, his *Elements of International Law*, has gone through several editions, of which the sixth, published in Boston in 1855, contains many valuable notes by the editor, Mr. W. B. Lawrence, formerly Chargé d'Affaires of the United States in England. And a still more valuable edition, the eighth, was published in 1866, edited by Mr. R. H. Dana, whose notes are of the highest value. This work, being published subsequently to the American Civil War, contains copious remarks, written in a temperate and judicial spirit, on the important maritime questions which arose for discussion during that momentous struggle. The work of Dr. Wheaton, of great interest when published in two small volumes in 1838, is now, and long will be, from these successive and highly valuable augmentations, of the greatest importance to all who have to study, or to consider, questions of International Law. Besides being translated into French, Dr. Wheaton's work has had the remarkable compliment paid to it of being translated into Chinese. This was done in 1864, under Imperial auspices, as a text book for Chinese officials in questions of International Law, and it is said that the work has been already quoted and relied upon by the Chinese government in its diplomatic correspondence with ministers of Western Powers resident at Peking.*

One of the most interesting and instructive works that have been published on this subject is the *Introduction to*

* See Dana's edition of Wheaton, the eighth, Part I. § 13, note 8.

the Study of International Law, by Dr. Theodore D. Woolsey, lately President of Yale College. This work, of which the first edition appeared in 1860, has been republished in England in the present year, 1875, reprinted from the fourth American edition of 1874. This treatise is written with a comprehensive knowledge of both old and modern writers on the subject, with copious references to state papers and to the decisions of both American and English Prize Courts, and is especially valuable as shewing the views taken in America on many important questions respecting which Great Britain and the United States have occasionally been at issue. The work is written with great fairness, though, as it should be, with a wholesome national feeling, and diplomacy would have few difficulties to encounter, if controversies could be conducted with such a desire for justice and fair dealing as is shewn in this treatise by Dr. Woolsey.

In 1861 Major-General Halleck, M.A., published at San Francisco his work on *International Law, or Rules regulating the Intercourse of States in Peace and War*. The author informs us in his Preface, that having been on the staff during the war between the United States and Mexico, he was often called upon to give an opinion on different questions of International Law, growing out of the operations of the war. This induced him to arrange a series of notes and extracts in a form convenient for use. The practical character thus given to General Halleck's treatise makes it of especial value to officers of the army and navy, as well as to others interested in the subject. As this work was published in May, 1861, it necessarily has not the advantage of the examples afforded by the recent great military and naval operations. But a new edition is promised, which will no doubt contain

ample citations from the precedents afforded by recent experience.

Besides the evidence afforded by these, and by various Continental publications which will be subsequently mentioned, of the increased attention now given to such questions, several bodies, both public and private, as well as most European governments, have recently shewn a greatly augmented interest on the subject of International Law.

The munificent endowments founded under the will of Dr. Whewell, who died in 1866, have been already alluded to. The will provides that a sum of 500*l.* a year shall be paid to a Professor of International Law, and that eight scholarships shall be created, tenable for four years, two candidates to be elected yearly, one at 100*l.* a year, and one at 50*l.* a year. These attractive conditions will, no doubt, induce a number of students to give their attention to International pursuits, and the University has been fortunate in obtaining as its Professor Sir William Vernon Harcourt, whose valuable writings on such topics, under the name of *Historicus*, are widely known,—writings which contributed at a critical period to instruct and lead the public mind on the important questions then at issue. These remarkable essays have been collected and republished, with some important additions, in a separate form, which is fortunate,—as though few writings exercise so wide an influence, few are so difficult to refer to, as the contributions to a daily newspaper. These Letters will now be of permanent value on the questions of which the author treats, and it is to be hoped that a long and useful career may yet be before this powerful writer.

At Oxford, the Chichele Professorship of International Law, endowed with an All Souls' fellowship, was long held by Professor, now the Right Honourable, Mountague Bernard, widely known, not only by his valuable writings, but also by the assistance which he gave to the representatives of Great Britain in our controversies with the United States, terminated by the Geneva Arbitration. As long ago as 1856, Mr. Mountague Bernard contributed to the Oxford Essays for the year a valuable paper on the Growth of Laws and Usages of War, full of interesting historical suggestions, and with passages of real eloquence when pleading for a humane exercise of the rights of war. In 1868 Mr. Mountague Bernard, then Chichele Professor of International Law and Diplomacy, further published Four Lectures on subjects connected with Diplomacy. They comprise deductions from a large range of reading, and will repay the perusal of those not specially concerned in such pursuits, by their copious historical citations, and by their high moral tone. The fourth lecture, on the Obligation of Treaties, is of especial and permanent value. Again, in 1870, Professor Mountague Bernard published his largest and most important work, his *Historical Account of the Neutrality of Great Britain during the American Civil War*. History has been said to be philosophy teaching by examples, and such is the scope of this Treatise, which is composed of a sort of clinical lectures on the various international difficulties that were presented during that momentous conflict. It has thus a most important practical character, and is a work of the highest value to all students of International Law. Though retired from the duties of his Professorship, it is to be hoped that Mr. Mountague Bernard has not retired from the function of an instructor of his fellow-countrymen.

And the Inns of Court have now recognized International Law as a part of the course of Legal Education, and the writer's highly-valued colleague, Professor Sheldon Amos, is the present Lecturer on the subject.

On the Continent some very valuable Societies have recently been inaugurated, having for their object the discussion of questions of International Law, with a view to the better definition of the principles and practice relating to this subject, and to the improvements which may be suggested as desirable to be carried out by mutual consent.

Of these, the "Institute of International Law" was founded at Ghent in September, 1873, and held its first annual meeting for discussion at Geneva in September, 1874. This Society is limited to fifty full members, and is composed exclusively of Jurists. There are also a few auxiliary members, who can be present at the meetings, but have no right to vote.

The "Association for the Reform and Codification of International Law" held its first meeting at Brussels in October, 1873, and its next meeting in September, 1874, in the week following the meeting of the "Institute," and in the same rooms, at Geneva. Some of the most eminent Professors and Jurists of Europe and of the United States attended these meetings. There were some interesting discussions respecting Arbitration and Codification, which appear to be the principal aims of the Association, some members going to the length of asserting that all international difficulties might be submitted to arbitration, while others held that there were questions concerning its position and independence which no State

could submit to arbitration. Both these Societies have, in the present year, 1875, held interesting meetings at the Hague.

Also our own Association for the Promotion of Social Science and the Amendment of the Law has a section devoted to the consideration of such subjects; and the meetings of 1873, 1874 and 1875 have been especially valuable, from the eminence of the men assembled, and from the instructive discussions in which they took part.

The establishment of such Associations is of very great importance, partly from the promise they hold out of a permanently concentrated attention upon such questions, and partly from bringing together, and making known to each other, men who are engaged in the same investigations, and who have the opportunity of "proving their armour," which nothing affords so well as friendly discussion.

Several treaties and less formal agreements attest the interest recently taken in endeavours to promote more humane observances in the conduct of hostile operations. The Convention of Geneva in 1864, relating to the neutralization of hospitals and ambulances for the wounded, reflects the greatest credit on its humane originators, and seems to be now generally accepted, though some suggestions have been made for the prevention of abuses of the Geneva Cross alleged to have taken place in the late war. Also the Declaration of St. Petersburg, in 1868, prohibiting the employment of explosive balls, except under certain conditions of weight and number, must be felt to have been framed in the interest of humanity; and though this rule is said to have been infringed during the late war, this accusation does not seem to have been esta-

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blished, and the evident advantage of the principle recommends it for general adoption.

In this country there was passed in 1870 an "Act to regulate the Conduct of Her Majesty's Subjects during the Existence of Hostilities between Foreign States with whom Her Majesty is at Peace." This is a great improvement on our Foreign Enlistment Act of 1819, which it repeals and supersedes. The chief advantage of the new Act is that in suspected cases it throws the burthen of the proof of innocence upon the shipbuilder, instead of obliging the Government to establish a right to interfere in a case where the proof of guilt is difficult, while the proof of innocence is easy. Had this Act been passed some ten years previously it would have saved much angry feeling, as well as the heavy penalty awarded against us by the Arbitrators at Geneva.

It was suggested at the Conference at Brussels in 1874 that it would be desirable for the several powers to agree upon municipal laws, to be enacted by the different governments, for the enforcement, by penalties, of regulations connected with International Law which are at present of imperfect obligation. This might have spared us a memorable crisis, when the administration of Lord Palmerston was overthrown, in 1858, for attempting to pass a law to prevent conspiracies in this country against foreign sovereigns, like the then recent case of Orsini. And similar considerations have been brought forward lately in the remarks addressed by the German government to Belgium, respecting certain complaints of a want of comity in respect of the treatment of political conspirators against foreign States, which the Belgian laws were said to be insufficient to secure.

One of the most important agreements ever signed on the subject of Maritime International Law is that known as the Declaration of Paris, dated 16 April, 1856. This derives its great weight partly from the magnitude of the interests which the Declaration proposes to regulate, and partly from the pre-eminent position of the parties to the agreement. Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey, were the original signatories of the Declaration, to which most other States have since given their adhesion. The four articles agreed upon are as follows:—I. Privateering is and remains abolished. II. The neutral flag covers enemy's goods, with the exception of contraband of war. III. Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag. IV. Blockades in order to be binding must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The Declaration commences by stating that, "considering that maritime law, in time of war, has long been the subject of deplorable disputes; that the uncertainty of the law and of the duties in such a matter gives rise to difficulties of opinion between neutrals and belligerents which may occasion some difficulties, and even conflicts; that it is consequently advantageous to establish an uniform doctrine on so important a point," the powers above-named, "having come to an agreement, have adopted the following solemn Declaration."

The instrument concludes by stating that "the present Declaration is not and shall not be binding, except between those Powers who have acceded, or shall accede, to it." This is necessarily the case with all such Declarations, as

agreements relative to International Law cannot be binding on States which are not parties to such agreements. Spain and the United States have not acceded to the Declaration, and are therefore subject to the provisions of the old law. The position of the United States in respect to the articles of this Declaration will be noticed subsequently.

The effect of the Declaration of Paris upon the rights and the interests of Great Britain have been on several occasions discussed both in Parliament and elsewhere. But after the exhaustive debate in the House of Commons on 13th April, 1875, it may be assumed as decided that the national faith is pledged to the permanent observance of the articles of the Declaration, towards all States who are parties to the agreement. And it is said that the United States, Spain and Mexico are the only countries that have not given their adhesion to the articles of the Declaration.

The three rules laid down in Article VI. of the Treaty of Washington would have been of great importance if the Contracting Powers had been able to agree on the meaning of the terms of their own Convention. But as this has not hitherto been accomplished, this Convention adds little to the determination of the rules recommended for the observance of neutrals during war. The three rules are as follow :—

A neutral government is bound—

First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a Power with which it is at peace; and also to use like diligence to prevent the

departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction to warlike use.

Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly. To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

The two contracting parties engaged not only to be bound by these stipulations themselves, but to invite other maritime governments to agree to receive the three rules as binding agreements in the observance of neutrality. But it soon transpired that there was a divergence of opinion between the Contracting Powers themselves as to the actual meaning of their own rules, especially of the second. It was proposed by Great Britain to explain this by stating that it was not intended to restrict the export, in the ordinary course of commerce, of arms and military supplies. But the American government refused to agree to this limitation, and it of course became impossible to urge the acceptance by other Powers of rules upon the interpretation of which the Contracting Powers themselves were unable to agree.* Perhaps little has been lost by this, as it was hardly probable that maritime powers would

* Parl. Paper, North America, No. I. of 1874, Correspondence relating to the Rules of the Treaty of Washington.

bind themselves by stipulations of which the benefit was not very clear, while there was the obvious danger, even if the second rule had been satisfactorily explained, of complications arising from the construction of what was "due diligence."

The Conferences held at Brussels in July and August, 1874, promised results of the highest importance in the definition of the rules of military warfare. But so much discouragement has been given by our government, by part of the press, and in Parliament, that it is to be feared that the hopes which many had formed will not be realized, and that want of cordiality, if not some unfriendly feeling, may arise from our conduct, in some degree frustrating the benevolent intentions which led to these Conferences.

It appears that a Society for the Amelioration of the Condition of Prisoners of War, instituted in June, 1872, had proposed that a Conference of Delegates from various States should be held at Paris in May, 1874, to discuss and promote the objects of the Society. This was however superseded, when it was announced that the Emperor of Russia intended to invite an assembly at Brussels of representatives accredited by their several governments, to consider a "Project for an International Code, with the object of determining the Laws and Usages of Warfare." Each of the invitations to the various governments was accompanied by the "Project for an International Convention respecting the Laws and Customs of War," which was declared to be inspired by humanity, and by a desire to mitigate and limit the miseries and horrors of warfare. The sections of this project formed the basis of the subsequent discussions at Brussels.

Nearly all the governments addressed responded by sending representatives to the Brussels Conference. The United States declined on the ground that the invitation had not been forwarded in time. It undoubtedly arrived very late. A telegram, dated Washington, 18th July, 1874, informed Lord Derby that "the Russian Government invited the Government of the United States on the 8th inst., and again yesterday, to be represented at the Brussels Conference. The Government of the United States have declined on the ground of the lateness of the invitation." The Conference held its first sitting on the 27th. But the United States probably were little interested in discussions limited to military warfare.

Great Britain gave rather a reluctant assent, apparently from the belief that the maritime rights of belligerents might become the subject of discussion. And some rather ambiguous expressions at an early stage of the proposal might have been stretched to include a denial of the right of any maritime captures of private property. All intention of discussing any questions whatever relating to maritime International Law was however wholly disclaimed by Russia, and by every other European government, from each of whom our Foreign Secretary thought it necessary to request a categorical reply before accrediting a delegate to the Conference.

In his despatch of 17th April, 1874, proposing the Congress at Brussels, Prince Gortchakow stated: "The project which we submit to the examination of the Cabinets is only a starting-point for ulterior deliberations, which we trust will prepare the way for a general understanding. To this end we are of opinion that a Conference of Special Plenipotentiaries might be convoked to discuss these

questions, and to decide upon a definite Code, which might, thenceforth, be clothed with an international character."

But on the 20th of June the German Government stated that they could not follow the example of some other governments by investing their envoys at Brussels with plenipotentiary powers. They did not consider the matter to be a diplomatic one. And on the 4th July the British Government declared that they were "firmly determined not to enter into any discussion of the rules of International Law by which the relations of belligerents are guided, or to undertake any new obligations or engagements of any kind in regard to general principles." And, further, that "they would confine themselves to sending a military officer as delegate, who would not be invested with any plenipotentiary powers, and who would simply report the proceedings, reserving to her Majesty's Government entire liberty of action in regard to them."

Subsequently the Baron Jomini, who was first Russian delegate, and also the elected President of the Conference, commenced the proceedings of the Conference by reading the instructions he had received from the Emperor of Russia. The object of his imperial majesty, as expressed in this document, is, that the Russian project should form a practical basis for deliberations on which the final issue must depend; and the President, on more than one occasion during subsequent meetings of the Conference, declared that the proceedings amounted to nothing more than an inquiry into the subject, the result of which should be submitted to the various governments.

Thus there could be no question as to the conclusions arrived at by the members of the Conference not having

any binding effect upon their governments. The declared intention was that of promoting a general understanding, and it was agreed not even to enter on the protocols of the proceedings any points on which the delegates were not unanimous. The uncertainty existing as to what are at the present day the laws of war, made it desirable to endeavour to give them precision by a general agreement. And "the hope of diminishing, if only to a moderate extent, the responsibilities which war imposes on governments and the calamities which it inflicts on peoples, constitutes a task worthy of the sovereigns and the governments who responded so willingly to the invitation of the Emperor."

But the English ministers have, from the first announcement of the proposed Conferences, shewn great hesitation in admitting that any good result from them was probable. So much so that, notwithstanding her Majesty's relations with the Emperor of Russia, our ministers have twice inserted in the Queen's Speeches observations implying doubt and disparagement respecting a scheme in which the Emperor is known to have taken great personal interest.

In the Speech proroguing Parliament on 7th August, 1874, her Majesty states: "The Emperor of Russia having made proposals for a Conference to be held at Brussels, the object of which is to lessen, by judicious regulations, the severities of war, I have, in common with other Powers, authorized a delegate to attend that Conference; but, before doing so, I have thought it right to obtain assurances from all the Powers thus represented that no proposal shall be brought forward calculated either to alter the recognized rules of International Law or to

place restrictions on naval operations. The recommendations which may issue from the Conference will have my careful consideration, but I have reserved to myself full freedom of action in regard to their acceptance or rejection."

At the conclusion of the Brussels Conference, the first German delegate, General Von Voigts-Rhetz, expressed the hope of himself and of the other delegates, that they might some day again assemble around their President, the Baron Jomini, and that they would not say to him "Adieu" but "Au revoir." And at the end of 1874 it became known that the Emperor of Russia had invited the various governments represented at Brussels to send delegates to St. Petersburg for the purpose of continuing the Conferences.

But our Ministers again shewed their reluctance to acquiesce in the views of the Russian Government. And in the Queen's Speech on the opening of Parliament, on 5th February, 1875, her Majesty said: "The Conference held at Brussels on the Laws and Usages of War has concluded its sittings. My Government have carefully examined the reports of its proceedings; but bearing in mind, on the one hand, the importance of the principles involved, and, on the other, the widely divergent opinions which were there expressed, and the improbability of their being reconciled, I have not thought it right to accede to proposals which have been made for further negotiations on the subject. The correspondence which has passed will be presented to you."

But it had been already pointed out in an admirable *communiqué* to the Russian *Invalides*, of which a transla-

tion was given in the *Times*, on 29th January, 1875, that "If in comparing the much contested principles of International Law with the exigencies of modern warfare the members of the Conference found it difficult to agree, this only proves how ambiguous those principles are, and how very differently they may be interpreted. . . . Despite the undeniable merit of the Professors of International Law in mitigating the horrors of war, science alone can never hope to attain the end in view. Science has no power to enforce its verdicts, and, what is worse, the opinions of its various representatives do not always agree with each other, or are based upon untenable premises, or in some instances are unknown to those who ought to be guided by them. Hence the laws of war as fixed by international usage proved a very feeble and obscure code when put to the test. All wars led to mutual recriminations on the part of the belligerents, and though certain broad principles might be generally recognized, the mode of observing them was always matter of doubt. The natural result of this sorry state of things was exasperation on both sides, and universal indulgence in barbarous reprisals. To remove these evils must be doubly desirable at this time of all others. The material resources of all nations having been considerably developed, war is more intensely felt than formerly, and the means at the disposal of governments being so very much greater than they were, any armed conflict in these modern days necessarily assumes a particularly cruel and destructive character. It is therefore to be devoutly wished that the laws of war be codified and rendered at once more intelligible and obligatory. To do this was the task of the Brussels Conference. . . . It is superfluous to add that the questions mooted at the Conference are not new; they have arisen at all times, in all wars. While it is impossible to ignore

them, it is equally impossible to say that International Law has settled them satisfactorily and with sufficient clearness . . . What the Brussels Conference wished to effect was merely to prevent useless suffering, and to do away with the cruel reprisals occurring under the present *régime*, to define the laws and usages of war, to protect the defenders of their country, the wounded and the prisoners, from unnecessary hardships, and to secure the unconditional recognition of the personal rights of every soldier in acquitting himself of his military duties. These were the only objects of the Brussels Conference."

Similar in purport is the admirable State Paper, dated 5th February, 1875, in which Prince Gortchakow replied to the note of Lord Derby declining to take part in the proposed deliberations at St. Petersburg. Regret is expressed at this decision, as "It would have been desirable that the voice of a great nation like England should have been heard in an inquiry, of which the object would appear to have met with its sympathies." It is stated that, "However imperfect the proposed rules may still be, the governments who discussed and accepted them have done so in a spirit of humanity." And it is urged that, if the English Government states "that it will keep to the principles of International Law, in accordance with which its acts have been hitherto regulated, and that it will impose the same obligation upon its allies, it would have been desirable that its meaning should have been rendered complete by stating what those principles are—how it and its allies interpret the doubtful points—and fill up the blanks of International Law, specially with reference to the questions which have been the objects of discussion at Brussels." It is finally represented that "the vagueness with which the Law of Nations allows all these questions

[of the laws of war] to be surrounded, and which the English Government refuses to assist in clearing up, even by a simple, common deliberation, has not hindered, and will not probably diminish, aggressive wars; it appears doubtful whether it will protect from the rigour and abuse of force more efficaciously than in times past those people who have patriotically defended their invaded territory."

Whatever may be the future results, if there should be any, issuing from the Brussels Conference, there can be no doubt that, in every determination arrived at, the decision was in favour of the more humane observance of the laws of war. There were, of course, divergences of opinion, but in every case the discussions resulted in the adoption of the most humane construction of a disputed point. There was in reality only one question of importance, namely that of Reprisals, on which a satisfactory agreement was not ultimately arrived at. On the main principles regulating the conduct of belligerents a general understanding was established. It was declared that operations of war must be directed exclusively against the forces and the means of making war of the hostile State, and not against its subjects, so long as the latter do not themselves take any active part in the war. The laws of war do not allow to belligerents an unlimited power as to the choice of means of injuring the enemy; and infliction of unnecessary suffering is prohibited, as well as all destruction or seizure of the property of the enemy which is not imperatively required by the necessity of war. Fortified towns are alone liable to be besieged; open and undefended towns or villages cannot be bombarded; a town taken by storm should not be given up to the victorious troops to plunder. The

treatment of spies and of prisoners of war is regulated,—and it will give some idea of the necessity for such regulation, that it was only after serious dispute that it was conceded that persons in a balloon should, if captured, be treated as prisoners of war and not as spies. The rights of an enemy towards an occupied territory,—which it was claimed should be extended even to territory over which flying columns were moving,—was restricted to territory actually placed under the authority of the hostile army. The power of levying contributions and requisitions was limited, and was only to be exercised by order and on the responsibility of the commandant of the locality occupied, private property being respected, and receipts given for all payments or services required by the necessities of war. The threat of extermination towards a garrison which obstinately defends a fortress is forbidden. The rights of combatants and non-combatants are defined.

Those who consider such limitations as common-place and self-evident will do well to read the account of what took place in the late Franco-German War, as related by M. Rolin-Jacquemyns in his *La Guerre Actuelle dans ses Rapports avec le Droit International*; or in the interesting and able work of Mr. Sutherland Edwards, *The Germans in France: Notes on the Method and Conduct of the Invasion, the Relations between Invaders and Invaded, and the Modern Usages of War*. The perusal of these works would probably convince every reader that some regulations should be agreed upon which may mitigate the severity of the present usages of war.

The principal obstacle to the recognition of the value of the Brussels Conference proceeds from the Articles respecting the inhabitants of a country rising in their

own defence against an invader. The Articles in question—the Ninth and Tenth—are as follows:—

Art. 9. The laws, rights and duties of war are applicable not only to the army, but likewise to militia and corps of volunteers complying with the following conditions:

1. That they shall have at their head a person responsible for his subordinates.
2. That they wear some settled distinctive badge recognisable at a distance.
3. That they carry arms openly; and,
4. That in their operations they conform to the laws and customs of war.

In those countries where the militia form the whole or part of the army they shall be included under the denomination “army.”

Art. 10. The population of a non-occupied territory who, on the approach of an enemy, of their own accord take up arms to resist the invading troops, without having had time to organize themselves in conformity with Article 9, shall be considered belligerents, if they respect the laws and customs of war.

These rules might with advantage have been altered without compromising the principle which they are intended to embody. The second Russian delegate, General de Leer, declared, in the sitting of August 14, that all four conditions must be observed for the rights of belligerency to be admitted. This severity has imperilled the success of the whole Conference. In many cases it would be difficult, in some impossible, for inhabitants rising in self-defence to obtain “at their head a person responsible

for his subordinates." General Von Voigts-Rhetz said, in the sitting of August 14, that the inhabitants could always have at their head the mayor, or some one chosen by his fellow citizens. But the notion of an English mayor putting himself at the head of an armed body of men, and being responsible for his subordinates, or knowing what are the laws of war to which they must conform, is simply absurd. Yet such provisions are declared necessary to prevent the defenders of their country from being shot in cold blood. By a Prussian Proclamation of August, 1870, "all persons who do not establish their quality of soldiers by external signs, and shall take arms against the German troops, shall be punished with death. In every case the officer ordering the trial shall institute a court-martial charged to examine the affair, and to give judgment upon it. Courts-martial cannot condemn to any punishment but the punishment of death. Their judgments shall be executed immediately."*

It is not surprising that the delegates of States which have no intentions of aggressive warfare, but which would vigorously resist an invasion of their territory, should regard with the utmost repugnance principles which have been illustrated by such a revolting interpretation. The Belgian delegate, Baron Lambermont, said that, "If citizens were to be sacrificed for having attempted to defend their country at the peril of their lives, they need not find inscribed on the post at the foot of which they are about to be shot the article of a treaty, signed by their own government, which had in advance condemned them to death." Other delegates expressed similar opinions, which have likewise received a warm support in England.

* Rolin-Jacquemyns, *La Guerre Actuelle*, &c.

Nevertheless, the principle which the Brussels Conference intended to enforce is in itself just, and is universally admitted. In modern wars, as it is well put by M. Rolin-Jacquemyns, it is not individual citizens, but States, who are the belligerent parties. Motives of humanity have caused this principle to be admitted, and the same motives demand that the consequences of this principle should be admitted. Among the first of these consequences is the distinction to be made between military forces and peaceable citizens. Each of these parties has its special rights and duties. Soldiers marching in an enemy's country are bound to respect the non-military inhabitants, but in return the latter must use no violence against the enemy's soldiers. It is obviously inadmissible that, under the garb of a peasant, men should surprise or assassinate the foreign soldiery. If this were otherwise, every war would be one of pillage and of reciprocal extermination.

These principles are not new ; they have been long recognised not only by writers on International Law, but by such men as Dr. Arnold and Dr. Whewell. They were adopted by the Duke of Wellington when he crossed the Pyrenees and entered France in 1814. And they were proclaimed during the American Civil War in the Instructions for the Government of Armies of the United States in the Field, drawn up by Dr. Francis Lieber.

It is, however, to be distinctly kept in view, that the right of the inhabitants of an invaded territory to rise in defence of their country was universally admitted at the Brussels Conference. At the sitting of the 17th of August Baron Jomini said : " In principle it has been unanimously agreed and acknowledged, by all the members of the Committee, that the patriotic feeling which induces the effective

men of a nation to take arms to defend the national territory when invaded, is not only an imprescriptible right but also a sacred duty. On the other hand, it was acknowledged that if this patriotic movement was left to itself,—without direction, without organization, without rules, without precautions,—serious inconvenience might result, not only in respect to the public security of the country itself, but also in respect to the efficiency of the defence, and the character of extreme rigour which the contest would inevitably assume under such conditions.” At the sitting of the 14th August the German delegate said, that a *levée en masse* was a legitimate course; that it could not enter into the mind of any one to hinder or prevent it; that what is demanded is, that it should in some manner be organized, in order that it may not degenerate into brigandage. The Swiss delegate pointed out that at the beginning of this century, and the end of the last, whole valleys, without being either organized or commanded, rose *en masse* to march against the enemy. Such a patriotic feeling cannot be denounced. Those who defend their country are not brigands. It would be desirable for those joining a *levée en masse* to wear a distinctive badge, but on a sudden emergency it might be difficult to satisfy this condition. And with regard to Austria, so lately as 1866 there was a *levée en masse* in the Tyrol.

It has been ably argued that the Brussels regulations would be to the advantage of the great military powers, and to the disadvantage of the weaker, or less military powers. But Prince Gortchakow, in the State paper already cited, says, “The Russian project in no way contemplates developing the military power of great States and procuring advantages in favour of those possessing large armies, and whose military service is obligatory. These powers exist.

The advantages which they derive from their military organization likewise exist. The Conference did not create them. . . . The Brussels Conference has therefore done nothing more than to declare and regulate that which results from the force of circumstances and the necessities of the age. Far from restraining national defence, it tends rather to strengthen it, on the one hand by rendering it more efficacious, on the other, by sheltering it from the consequences of the abuse of force, and by securing for it regulated treatment on the part of the enemy. The conditions proposed with this object have been reduced to their simplest terms. They are easily applied, and by no means onerous. Their object is, above all things, to distinguish the citizen who defends his country from the marauder, the plunderer and the assassin; to secure for the former the consideration to which he is entitled, and to shield him from the severities which the laws and customs of war authorize with regard to the latter. . . . The theory according to which, whilst admitting that the stronger may in certain cases be compelled to use harsh measures, and the weaker compelled to submit to them, it is nevertheless preferable to submit to force rather than to recognise it, would finally end in establishing the absolute rights of force (which would be the only measure of severity to be exercised) and obligatory submission. It is impossible not to be surprised at seeing this assertion brought forward by the so-termed defenders of the weak."

It is earnestly to be hoped that some method may yet be found to reconcile these antagonistic pretensions. The English note states that the interests of the invader and the invaded are irreconcilable. But let us hope that the difficulty may yet be solved by some definite agreement.

As Baron Jomini well pointed out at Brussels, "*Le vague ne profiterait qu'au plus fort.*"

On the question of Reprisals it was unfortunately found impossible to come to any common agreement at the Brussels Conference. It seemed to be the general feeling that occasions on which reprisals of a severe character had been exercised were of far too recent a date to allow the practice to be discussed calmly. Yet few questions could be of more importance in actual warfare. For instance, on the first disasters of the late war, the French Government permitted the formation of *francs-tireurs*, and declared that as soon as these companies received the authorization of the Minister of War they ought to be treated as soldiers. But the Prussian Government maintained that this authorization was not sufficient, but that these corps must be submitted to the French military laws and commanded by French officers. The French Minister of War declared that, if the Prussians treated such troops as non-military persons, the French would use reprisals towards the men of the landwehr and landsturm. Again, in their proclamation affixed at Beauvais, in October, 1870, the Prussians stated: "Every attack made by surprise will be followed by the burning of the place. . . . If arms are not deposited at the *mairie*, houses where arms are found will be burnt, and the proprietor will be held responsible." On the other hand, it was openly boasted in a French journal, of which it is better not to give the name and date, that twenty-five *francs-tireurs* had, by clothing themselves in Prussian uniform, killed several Prussians at Sennegy near Troyes. It is not surprising that such proceedings should on both sides create great exasperation, and often lead to bitter retribution. Mr. Sutherland Edwards writes: "Laws, in fact, are not

'silent' in the midst of arms, but the laws made to replace ordinary laws are of a primitive and barbarous type. In principle they might not unfairly be summed up as follows: 1. For every offence punish some one: the guilty if possible, but some one. 2. Better a hundred innocent men should suffer than that one guilty man should escape. 3. When in doubt shoot the prisoner."

It would require another Chatham to denounce in language sufficiently powerful practices so repugnant to "every sentiment of religion and every feeling of humanity." The project proposed by Russia was of a mild and temperate character, and it would have greatly tended to mitigate in practice severities such as had been resorted to. It was simply as follows:—

Sect. 69. "Reprisals are admissible in extreme cases only, due regard being paid, as far as shall be possible, to the laws of humanity, when it shall have been unquestionably shown that the laws and customs of war have been violated by the enemy, and that they have had recourse to measures condemned by the Law of Nations."

Sect. 70. "The selection of the means and extent of reprisals should be proportionate to the degree of the infraction of the law committed by the enemy. Reprisals that are disproportionably severe are contrary to the rules of International Law."

Sect. 71. "Reprisals shall be allowed only on the authority of the commander-in-chief, who shall likewise determine the degree of their severity and their duration."

But even these moderate proposals could not be carried at the Brussels Conference. It was felt that from the

recollection of recent occurrences a discussion might imperil the harmony that had hitherto prevailed among the delegates, and lead to results to be deprecated in every point of view. And the Baron Jomini, in agreeing to the suppression of the chapter, could only remark: "I regret that the uncertainty of silence is to prevail with respect to one of the most bitter necessities of war. If the practice could be suppressed by this reticence I could but approve of this course. But if it is still to exist, this reticence may, it is to be feared, remove any limits to its exercise. Nevertheless, I believe that the mere mention in the protocol that the Committee, after having endeavoured to regulate, to soften, and to restrain reprisals, has shrunk from the task before the general repugnance felt with regard to the subject, will have a most serious moral bearing. It will, perhaps, be the best limitation we have been able to affix to the practice, and especially to the use which may be made of it in future."

It is fervently to be hoped that an agreement may at some future time be arrived at that may mitigate practices which are nothing less than a disgrace to humanity.

It has been thought desirable to discuss, at a length which is regretted, the proceedings of the Conference at Brussels, because this Congress is the most important opportunity that has ever occurred for the ascertainment and the amelioration of international usages in time of war. It seemed to offer a fresh point of departure for considerations respecting some most important parts of the Law of Nations. The eminence of the delegates,—some as soldiers, some as statesmen, some as jurists,—gave to the discussions which took place, and the decisions arrived at, an authority never possessed by any similar assembly.

It is understood that the Conferences proposed to be renewed at St. Petersburg are now indefinitely postponed; but whenever a future occasion shall present itself for the expediency or the necessity of such discussions, the Brussels Conference will be the event reverted to for precedent and imitation. It may perhaps be remembered, with a regret that its purposes were not achieved, by many now living, who may have to witness, or to endure, sufferings which its proposals would have mitigated or averted. And the Emperor, who has already earned the perpetual gratitude of his own country by the enfranchisement of the Russian serf, will be recorded as further entitled to the gratitude of all humanity for his benevolent promotion of the Brussels Conference.

As an Englishman I cannot but regret that our country, which has always hitherto stood in the front of all movements of humanity and progress, should have taken a position that has gone far to neutralize, or to frustrate, proposals which were intended to lessen the miseries inseparable from warfare. It appears to have been chiefly a jealousy respecting maritime rights which has occasioned the coldness shewn by England towards the promotion of the Conference. But, even if all intention of discussing these had not been expressly disclaimed, it would appear that, even with respect to maritime regulations, any definite agreement must be to the advantage of Great Britain. The great principles on which our maritime supremacy is supposed to depend are already settled by definite treaty. The Declaration of Paris has permanently arranged such controversies. Neutral nations who have joined in the Declaration will now have few more restrictions on their commerce than they would have if maritime capture were altogether given up. And the desire which is shewn in some quarters for the latter concession only proves how

necessary it is to uphold the present law, from the important deterrent effect which this law would have when considering recourse to hostilities. There only remain for ascertainment certain minor points, which might produce dissatisfaction and ill-feeling in time of war, and which could easily be arranged by friendly discussion in time of peace. For instance, the search of vessels sailing under convoy would be a permanent source of irritation. And the question is still unsettled regarding the stoppage of vessels carrying despatches for an enemy. It is easy to conceive what exasperation would arise if some of our ocean steamers were carried into port and subjected to the jurisdiction of a prize court. Nothing was settled by the case of the "Trent," which will be subsequently mentioned. Nor could the arrangement as to the immunity of mail-bags, entered into between Mr. Seward and Lord Russell in 1862, have any binding force upon other governments. And with regard to Contraband of War, though it may appear to most jurists of all nations that no doubt whatever can exist on the subject, yet it must be remembered that the strict right to sell contraband articles, even in the vendor's own country, is disputed, as will be subsequently shewn, by Sir Robert Phillimore, not only a high authority in himself, but of still greater weight on such subjects as the Judge of the Court of Admiralty, under whose jurisdiction, therefore, such questions would in time of war be presented. Surely it is desirable that all doubtful questions should be determined by friendly discussions during peace, and that the imputation alleged, however unjustly, against the Great Military Powers, of supporting rules favourable to themselves to the disadvantage of weaker States, should not be applicable to the greatest Maritime Power. No stipulation contrary to the Law of Nations could possibly be carried by the members of a Conference; indeed, it was expressly declared that

such an assembly was wholly deliberative. And the Declaration of Paris well points out how the uncertainty of the law gives occasion for difficulties, and makes it advantageous to establish an uniform doctrine.

It is perhaps to the exemption from the miseries of modern warfare which attaches to our insular position that we owe an imperfect sympathy in a movement for the mitigation of such sufferings. Yet so long ago as 1856, many years, therefore, before the Brussels Conference was thought of, Mr. Mountague Bernard had pointed out that, "It is of consequence that there should be a solid and established body of usages and traditions to resist gusts of popular passion, as well as to curb the licence of armies in the field, and that the true principles on which alone war can be lawfully carried on should be diffused and understood. Especially ought this to be so in a country which is proud of its benevolence and refinement, and has itself suffered so little from calamities of this kind. We have no scenes of rapine, blood and shame to revenge or to forget. No one, I think, can have travelled over the bare, undulating plains of central Germany, studded at intervals with small old towns, each huddled within its square wall, and gray mouldering towers, like the background of an old picture, without a sense that he was indeed traversing the battle-field of Europe. No one but must have observed, as his eye strayed over some familiar English landscape, the careless freedom with which population has scattered itself over hill and dale, in every sheltered nook, and along every winding lane, and felt how the wreath of blue smoke floating upwards from the trees added, by suggesting faint images of peaceful life, a more than picturesque charm to the scene."*

* Oxford Essays for 1856, p. 135.

And in any future war the carnage to be anticipated from the continual increase in the power of weapons of destruction will be more frightful than even in the examples of recent warfare. Men will now have to fight, especially in naval warfare, not only against men, but against machinery; guns will be loaded by steam, and broadsides and torpedoes fired by electricity. Happy will the writer be, and still happier the statesman, who can contribute, in however remote a degree, to avert or to mitigate the calamities of such a warfare. "It must needs be that offences come, but woe to that man by whom the offence cometh."

It only remains to say a few words regarding the preparation of the present Edition. My original work was always imperfect, in every sense of the term,—among others in having no chapters on the functions and privileges of ambassadors and other representative ministers. Also the important precedents afforded by recent events required careful consideration. It had long been my intention to supply these deficiencies, but the demands on my time of a very active life, and I fear also the proverbial "thief of time," prevented my doing so, and now for some years my disability as a permanent invalid has disqualified me for any continuous exertion.

Under these circumstances, I have been most happy in obtaining the co-operation of Professor Sheldon Amos, of whom it would be unbecoming to say more in the present page than to express my warmest acknowledgments of the value of his assistance. Of this the reader will have ample evidence as he proceeds. I trust that the result will now be found to be a treatise embodying whatever is most worth considering on this important subject.

EDITOR'S PREFACE

TO THE PRESENT EDITION.

MY object in editing a New Edition of this Work has not been to attempt to supersede all or any of the various important works on the same subject which have appeared since the publication of the First Edition in 1839. On the contrary, I have done what I could in my annotations to direct the reader's attention at each point to the most authoritative and instructive treatment of the successive topics in the various accredited text-books of every country. But there are two points of special excellence in which, considering its compass, Mr. Manning's treatise has always seemed to me to be *facile princeps*; that is, (1) its strictly historical method minutely elaborated in detail; and (2) its exact appreciation of the subtle mode of combination of the Moral and Customary elements of which the Law of Nations is composed. No degree of accuracy or proximity in detailed statement of doctrines can—especially for the younger student—be a substitute for these essential features of a treatise on the Law of Nations; and it is because I have long found myself compelled to urge students to betake themselves to Mr. Manning's treatise, whatever other books they might usefully study likewise, that I have done what in me lies to assist the author in meeting the want occasioned by the book being now out of print. Only in very rare cases have I ventured to interfere with the continuity of the exposition by interpolating

matter of my own. It is a characteristic of the work that the artistic form is too complete in itself, and the sequence of reasoning too exact and severe, to have rendered this method of emendation tolerable. The bulk of my notes are at the close of the chapters. My general opinions both on moral and legal points are in harmony with those of the author, and where there are differences in our detailed judgments on past events I have seldom thought it worth while to obtrude them on the reader's attention. I believe the book now presents a systematic and exact, though of course not an exhaustive, view of every part of the subject in its latest phases.

S. A

9, KING'S BENCH WALK, TEMPLE.

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COMMENTARIES
ON
THE LAW OF NATIONS.

BOOK I.

DEFINITION AND HISTORY OF THE LAW OF NATIONS.

[*The Editor's additions in the text are marked by being enclosed within square brackets. His notes are signed "Ed."*]

CHAPTER I.

DEFINITION OF THE TERM AS HERE EMPLOYED.

THE want of sufficient exactness which attaches to much of the Law of Nations commences with the very name of the science, which is employed by different authors with very different limits of signification. This is in a great measure occasioned by a confusion of the words *Jus* and *Law*, which are not exactly synonymous. Pufendorf complains of this ambiguity, (1) the word *Jus* having the double sense of Law, and of Right, or moral obligation; and the term *Jus Gentium*, which is usually translated *Law of Nations*, would perhaps be more correctly rendered *Rights of Nations*. In this sense it corresponds with the French *Droit Public*, which includes the obligations existing between a State and its subjects, and also between different independent

Inexactness of the term "law of nations."

(1) De Jure Nat. et Gent. lib. I. c. 1, n. 20.

States. (1) Sir James Mackintosh used the term in this sense when he included in his Lectures a discussion of the whole social duties, treating of man considered both as an individual moral agent and as a member of a State, of forms of government, of civil and criminal laws, as well as of those relations between different States, which made only the fifth division of his course, and which he speaks of as "the Law of Nations strictly and properly so called." (2) The term *Droit des Gens* has been occasionally, but very rarely, employed in this extended sense, as by Dumont, who speaks of it as "le droit respectif des peuples les uns envers les autres, et aussi en eux-mêmes." (3) In a more limited sense, which is that usually understood, the term "Law of Nations" expresses those rules which govern the conduct of States in their relations with each other. It is, in the words of Grotius, "jus illud quod inter populos plures aut populorum rectores intercedit, sive ab ipsâ naturâ profectum, aut divinis constitutum legibus, sive moribus et pacto tacito introductum." (4) It is in this signification that the term *Droit des Gens* is usually employed by the French, (5) and the term *Völker-Recht* by the Germans. (6) Zouch, dissatisfied with the want of precision in the term *Jus Gentium*, entitled one of his Treatises "*De Judicio inter Gentes*," and another "*Juris et Judicii Fecialis sive Juris inter Gentes, et Questionum ab eodem, explicatio*." (7) The same term "jus inter Gentes" had before been, incidentally, used by Selden. (8) And the phrase "international law" is now in common currency, a definite and expressive term of which Mr. Bentham claims the fatherhood, (9)

(1) Klüber, *Droit des Gens*, ch. 1, a. 2.

(2) Discourse, p. 81.

(3) *Corps Dipl.* Preface, 1.

(4) *De Jure*, Prolegomena, I.

(5) De Martens, *Précis*, Introd.

(6) Ompteda, *Litteratur des Völker-Rechts*, I. p. 5.

(7) Hague, 1659.

(8) Selden de *Dominio Maris*, Pref. p. 1184.

(9) Bentham on *Morals and Legislation*, I. 260—262.

and which is almost the only term of his new political nomenclature that has passed into general circulation.

It is in this limited sense, namely, as comprising the rules which control the conduct of independent States in their relations with each other, that the term "Law of Nations" is employed in the following treatise: it is used as convertible with the term "International Law;" and is retained in preference to the exclusive employment of the latter phrase, because more completely domesticated in our language, of more frequent occurrence in the older works in which this subject is mentioned, and not liable to any charge of uncertainty when its extent of meaning has been once defined.*

Limitation of the term as employed in this treatise.

As the obligations of the fundamental principles of the Law of Nations arise from the Law of Nature, it has been usual, with many authors, to treat of the Law of Nature and the Law of Nations in the same work, and deducing the duties, both of individuals and of States, from one common origin, to pursue these deductions into their different ramifications, both of social and of national obligation. It has been above remarked, that such was the plan pursued by Sir James Mackintosh, and it is that adopted by Vattel, and by most other

Reasons for considering this subject in a separate treatise.

[* Since the first edition of this book was published the expression "International Law" has become more familiarly used both by professional writers and in common speech than the "Law of Nations." The word "International" has, in fact, been largely used of late to denote a class of facts which happen to be peculiarly of modern growth. Such are "International" exhibitions, postal and telegraph conventions, and congresses for a variety of objects. One inconvenience of adopting the expression "International Law" is, that the rules generated by the conflict of national systems of law are sometimes called "Private International Law," the law which is the subject of the present treatise being thus converted into "Public International Law," an opposition of language which is likely to lead to a dangerous misconception of the essential nature and generic differences of the two sorts of law.—ED.]

writers. This plan seems, however, to me to lie open to many objections, and I cannot but think it one of the principal reasons why the study of the Law of Nations has been so little followed in this country. An inquirer, wishing to learn anything upon this topic, is presented with a vast quantity of extraneous matter, of the very description which is least palatable to the political taste of this country, and is embarrassed and disgusted by a string of general propositions, on points which are never controverted in the present state of political knowledge. Thus in Vattel's work there are a variety of chapters regarding such rights and duties as "the cultivation of the soil," "commerce," "the care of the public ways," "money," "piety and religion," "justice and polity," &c., which, although they may be interesting to some readers, are for the most part tedious common-places to politicians in this country, and are quite unconnected with the Law of Nations as regulating the intercourse of States. It seems to me to be much better to have separate treatises dedicated to the different subjects of the duties of men considered in their various relations as individual moral agents, and as citizens of a State; and of the duties of States considered in their intercourse with other independent States. An additional reason exists in this country for such a separation of treatises; the former division, regarding man in his individual and social capacity, having been already occupied by a writer who is not likely to be supplanted by a better; I mean by Paley, whose work on Moral Philosophy I regard with the greatest respect, mingled with a sense of gratitude from what I remember of its influence; I object to some of his positions, and I think him inaccurate in some definitions, and unsound in some arguments, but I look upon his work as a whole with constant veneration, and I think it a book which may be improved, but which will, probably, never be superseded.

An objection to the term *law*, as applied to the rules which control the relations of States with each other, has been made by Mr. Austin, in his valuable work entitled *The Province of Jurisprudence determined*.* Mr. Austin, in his definition of laws "properly so called," includes the necessity of a "sanction" to enforce commands set by a determinate superior. Rules destitute of this sanction, he says, are only called laws by analogy. "Laws or rules of this species [set by general opinion], which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled the law of nations, or international law. Now a law set or imposed by general opinion is a law improperly so called;" (1) and the Law of Nations is accordingly included by Mr. Austin in the same category with the laws of honour and the laws of fashion. To this objection to the term "law of nations" it might be answered, that Mr. Austin himself allows that "divine laws" are "laws or rules properly so called;" (2) now "divine laws" are synonymous and identical with the laws of nature, upon which the law of nations is based. But my objection is that the word *law*, which has, in our language, so long been employed in a much wider sense, should, by a single writer, be declared to be only "properly" used with this restricted meaning. I believe that considerable latitude should be allowed to an author in giving what extent he pleases to the terms

An objection
by Mr. Austin
considered.

(1) p. 89 (3rd edition).

(2) *Id.* p. 88.

[* Mr. Austin's lectures have now passed through four editions, the first six lectures forming those which originally appeared under the title—*The Province of Jurisprudence determined*. The latest edition is what is called the "Student's Edition." Both this and the previous edition are excellently annotated by the accurate and erudite editor, Mr. Robert Campbell, and, by means of the typographical aid afforded, and a good marginal index, are freed from the more remediable of the objections to which the earlier editions were open.—ED.]

he employs, provided he adheres to his definitions; but I think that it would be better, in a word so commonly used with a different meaning, to have affixed some explanatory adjective to that *class* of laws which Mr. Austin refers to, instead of declaring that laws of this class are the only laws that can be properly so called. And this position I find strengthened by a passage in Hooker, a sound authority for an English word, who seems to have anticipated the very objection made by Mr. Austin. "They, who are accustomed thus to speak, apply the name of law unto that only rule of working which supreme authority imposeth; whereas we, somewhat enlarging the sense thereof, term any kind of rule or canon whereby actions are framed, a law." (1) *

(1) Eccles. Pol. I. 3, p. 72 (ed. 1676).

[* The popularity which Mr. Austin's writings have recently attained has had the effect of attracting a good deal of attention to his definition of the term *law* and to the rigorous limitations with which he surrounds it. Sir H. S. Maine has initiated a reaction against Mr. Austin's terminology mainly on historical grounds. He has pointed out ("Village Communities," Lecture II, and "Early Institutions," Lecture XIII.) that all the most characteristic phenomena of law are found to exist in states of society to which the essential elements of all law, according to Mr. Austin's definition, are wholly alien; and also that Mr. Austin's analytical method takes no account of the facts of the growth and the character of government as presented in any known national society. Sir H. S. Maine has lucidly explained how it came about that of the two aspects of law, "Force" and "Order," Mr. Austin fixed most of his attention upon the former aspect to the comparative neglect of the latter.

It is further to be noted that Mr. Austin's identification of the "Law of Nations" with "International Morality" was, on more grounds than one, most unfortunate. It tended to keep out of sight the remarkable parallelism, in form and substance, which the rules of the Law of Nations undoubtedly present to the national system of law of every civilized country, and it ignores the existence both of a true system of International Morality (however imperfectly evolved and recognised at present) and of the immutable lines by which the provinces of International, as of all other, Morality and of Law are severed.—ED.]

It is in this sense, of the rule "whereby actions are framed" by independent States in their relations with each other, that the term "Law of Nations" is here employed. In this sense the term has been constantly used in the writings of jurists, and in the diplomacy of governments; as, for instance, when Congress, during the American war of Independence, professed adherence to the law of nations "according to the general usages of Europe,"(1) and in innumerable other instances wherein the "Law of Nations," whatever that may be, is referred to as existing, and recognised as binding, in state-papers issued by every European government.

General currency of the term.

(1) Kent's Commentaries on American Law (Abdy's edition), p. 3.

CHAPTER II.

HISTORY OF THE SCIENCE OF THE LAW OF NATIONS.

Faint traces of the law of nations in ancient history. No inferences to be drawn from the Jewish dispensation.

AMONG the nations of antiquity but very slight traces are observable of any such sense of moral obligation as the law of nations imposes. The peculiar nature of the dispensation of the Jews prevented the rules enjoined for the guidance of that nation from being binding upon other States. Selden has some good remarks on this point in his Treatise, *De Jure Naturali et Gentium juxta disciplinam Ebræorum*, where he observes that the law of nature, as controlling human actions, being identical with the will of God, the exhibition of that will in the Jewish dispensation is of the first importance to the moralist, as containing direct revelations respecting human duty. (1) But much was revealed as divine will to the Jews which had exclusive reference to them as a peculiar people; and this applies most forcibly to their conduct towards other nations, where the necessity of suppressing idolatry made unusual measures indispensable. Of this nature were the prohibition to trade with other people, their commission to extirpate certain nations, the slaying of prisoners, and other such cases which clearly had reference solely to the Jews as a peculiar people. To the Jewish dispensation, therefore, although of divine revelation, we cannot have recourse for precedents as to the law of nations, a law of which the Jews had no idea, and from the obligations of which they were absolved by their peculiar circumstances.

(1) Lib. I. c. 8.

Among the Greeks there were a few customary observances in their conduct towards foreign States; but their slaying their prisoners, and occasional maltreatment of ambassadors, shew them to have had nothing that can properly be called a notion of the law of nations, any more than that existing among the Iroquois, with whom Montesquieu (1) declares that some traces of this law are observable in their respect for ambassadors from other tribes.

Among the
Greeks.

By the Romans rather greater attention was paid than by the Greeks to the customs observed in their intercourse with other States. The Romans had their well-known college of *feciales*, instituted by Numa Pompilius. It was composed of twenty persons, of whom the chief bore the title of *Pater Patratus*, and their duties consisted of the consideration of all questions of peace and war, the conclusion of treaties, and the reception of ambassadors. As long as Rome continued a republic this institution still existed, but its active functions had ceased long before the period when inscriptions prove that the title was still extant: at the time of the Cæsars it had dwindled into obscurity, and in the reign of Tiberius hardly a trace of the feacial college remained. (2)

Among the
Romans.

But it seems to be incorrect to speak of the conduct of the Greeks and Romans towards foreign States as guided by the law of nations. Neither people had any idea of that law as obligatory upon all mankind: their feelings towards foreign States were of the utmost contempt, closely resembling those recently entertained in slave States by whites towards blacks: (3) and their

The term
hardly applic-
able to these
nations.

(1) *Esp. des Loix*, l. I. ch. 8.

(2) *Oempteda, Litteratur des Völker-Rechts*, I. 142—147.

(3) Witness the often cited confusion of language which in-

cluded a stranger and an enemy under the same word, *hostis*; and the sweeping condemnation of all foreigners passed by their name “barbariana.”

customs in their intercourse with foreign governments seem to have originated in no sense of moral obligation, but to have existed as little more than a part of their municipal law, ordaining certain rules to be observed by their officers in their conduct towards foreign governments. These usages were sometimes coincident with the law of nations, but were not adopted from any sense of right deduced from that source, and, as far as they may be available at the present day, have little value beyond what curiosity may attach to them as examples of the customary law of nations at a remote period.

Jus gentium
as employed in
the Roman
law.

The term *jus gentium* is used by the compilers of the Roman law, but it is employed in the sense of the French *droit public*, and not in the meaning of *international law*. The same principle, the law of nature guiding the conduct of mankind, constitutes the basis of the law of nations, but it was not considered by these jurists with reference to such obligations. (1)*

(1) "Quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est, vocaturque *civile*, quasi jus proprium ipsius civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes persequere custoditur, vocaturque *jus gentium*, quasi quo omnes gentes utuntur."

"*Jus naturale* est quod natura omnia animalia docuit, nam jus

istud non humani generis proprium, sed omnium animalium est. * * * * * *Jus gentium* est quo gentes humane utuntur, quod a naturali recedere facile intelligere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune est."

Gaius and Ulpian, as quoted by Ompeda, *Litteratur*, I. 153.

[* In his "Ancient Law" (ch. iii.), Sir H. S. Maine has investigated the historical point of contact between the *jus gentium* of the earlier, and the *jus naturæ* of the later Roman lawyers. In the Institutes of Justinian some confusion is manifested, the expression *jus gentium* being sometimes used as if it were convertible with *jus naturale* or *jus naturæ*, and sometimes as if it were opposed to the latter. (Compare I. J. (1, ii.), and II. J. (ii. 1).) Savigny complains severely of this confusion and explains how it arose. (*System des*

No trace of a sense of such obligations is observable during the convulsions attendant on the inroads of the northern tribes; nor in that succeeding political chaos which was superseded by the rude order established by the feudal system. The influence of chivalry introduced some mitigation of the cruelties of war, but the occasional massacre of prisoners, and other gratuitous ferocities, shew how slightly the understanding of humanity was as yet removed from barbarism. The laws of chivalry regarding usages in warfare were rather points of honour customary among the knights, than precepts enjoined by morality and held obligatory as duties. Like the modern code of honour, they were mandatory between equals. When a noble knight was to be dealt with, all was exalted courtesy; but when the multitude was in question, it was a begrudged mercy that was in use towards the "rascal-rout." Even the milder treatment of prisoners loses part of its claim to respect, from the practice of exacting ransom, which made humanity venal. This was carried to a most curious extent, such ransoms being transferable like any other property, and prisoners of war being occasionally conveyed from one owner to another, as payment in the purchase of estates. Of this we shall have to consider some curious instances, when examining the laws of war. And with regard to prisoners in general, an example afforded by our own Richard I. is a sad instance how little the

The law of nations in the times of chivalry.

heutigen Rechts, Beylage I.) He holds, in common with Sir H. S. Maine, that the only practical distinction really made by the Roman lawyers of any period was that between the *jus civile* and the *jus gentium*. Owing to Stoical influences the latter came to be called *jus naturale* or *jus naturæ*. This change of name undoubtedly affected the character and purport of the law itself, and while the one expression *jus gentium* suggested the applicability of Roman law to solve the dynastic and moral problems presented by the intercourse of States in the Middle Ages, the other expression (*jus naturæ*) seemed to point to the materials out of which the sought-for body of law might be constructed.—ED.]

genius of knighthood had established the true principles of humanity. After the capture of Ptolemais in 1191, the Saracen prisoners were to be delivered up on ransom, but some distrust having been shewn by Saladin, Richard had five thousand prisoners led out to an open plain and massacred. (1) This was an instance of barbarity that has only since been paralleled by an example afforded, nearly on the same ground, six centuries afterwards; with the difference that the English general acted in ignorance, and the French general in defiance, of the humanity commanded by the law of nations. The conduct towards ambassadors and heralds was likewise variable and unascertained. (2) I am not here detracting from the great service rendered by chivalry to civilization, nor from the interest which attaches to it from that generosity of sentiment which justifies its selection as the favourite period of romance; I am merely stating that, with reference to the law of nations, the influence of the age of chivalry had but slight claims to preference over the preceding ages; and such modifications as were introduced were not occasioned by any sense of the duties declared by that law to be incumbent upon all mankind.

Influence of
the Papal See.

The authority which superstition allowed the Papal See to usurp was occasionally exercised in settling disputes between nations. The assembly of deputed representatives from the different Christian states gave to the oecumenical councils the composition of a sort of European congress. Besides the settlement of articles of faith, and the deposition or excommunication of princes, determined in these councils, there are distinct examples in which the Pope was made referee in questions of international controversy. At the Council of Lyons, convened by Gregory X., in 1274, the inhabitants of

(1) See the particulars of their superstitious mutilation mentioned in Ward's *Enquiry into the*

Foundation and History of the Law of Nations in Europe, II. 138.

(2) *Id.* I. 286.

Ancona having contested the right of the Venetians to levy tolls, and exercise other rights of exclusive dominion in the Adriatic, the question was referred to the Pope, and was discussed. Judgment was given, that the inhabitants of Ancona had no grounds for their complaints, and that the Venetians were possessed of the sovereignty of the Adriatic. None of the ambassadors or princes present at the council objected to the decision, but the judgment passed without any protest respecting its validity (1). And decisions on questions between nations were given by the Pope individually, unassisted by such councils; as for instance, when the Spaniards were pushing their discoveries in the west, and the Portuguese in the east, these two nations referred to the Pope for limits in case their exploring parties should claim the same territories, and Alexander VI. accordingly gave them, in his well known bull, a line of demarcation. There are other notorious instances in which the Pope interfered in forbidding wars, and in permitting conquests; our own possession of Ireland having commenced under the latter sanction. The advantage that might have been derived from this papal interference would have been very great had it been an authority exercised for justice, instead of abused for ambition. So great a mind as that of Leibnitz was struck with the availability of such a power to promote justice among Christian nations, to the extent of desiring that the Pope, conjointly with the emperor, should still have the power of deciding questions among the European governments (2). But history shews that no reliance could possibly be placed on such a tribunal, always liable to the bias due either to the interests of the States themselves, or to the corruption of the arbitrators. The power of the popes was not more false in its origin than it was perverted in

(1) Selden, *de Dominio Maris*,
I. c. XVI.

(2) Opera (Geneva, 1768), IV.
380, 331.

its exercise; and in the ages of which we are speaking, an authority which, had it been animated by intelligence and guided by integrity, might have had an angel's power in the incalculable benefit it would have bestowed, was little more than subservient to a bad ambition, or degraded as the instrument by which priestcraft tyrannized over ignorance.

Maritime law during the middle ages. The Rhodian laws.

During the middle ages, maritime law had obtained a greater precision and fuller development than the laws of war. This was principally owing to the excellence of the Rhodian laws, which formed the basis of all the modern maritime codes, thereby accounting for the resemblance which these codes bear to each other. The date of the Rhodian laws is uncertain; they obtained the sanction of Tiberius, and subsequently of Adrian and other emperors. Their decisions respecting shipping, salvage, contracts, &c., are curious and valuable, but they contain nothing regarding prize law, or the law of nations properly so called (1).

(1) See the Rhodian laws, pp. 78—116, of a Work entitled "A general Treatise of the Dominion of the Sea, and a compleat body of the Sea Laws, containing what is most valuable in that subject in ancient and modern Authors: and particularly the Laws of the Rhodians and Romans, those of Oleron, Wisbuy, and other Countries," &c., &c., 4to. 3rd ed. London, no date. It purports, in the preface, to be the work of several authors. There is also a work entitled "Laws, Ordinances, and

Institutions of the Admiralty of Great Britain, civil and military, &c." 1st ed. dated 1746, and 2nd ed. dated 1767. As the work above quoted purports to be the 3rd edition, it may be the same work, though with a different title. If this be not the case, there is disgraceful plagiarism in whichever work was last published, for the matter contained in the two books is nearly identical, with very few changes, and there is not the least notice of any obligation to preceding works.*

[* The best collection of all the fragments which there is reason to believe formed part of the Rhodian laws will be found in M. Pardessus' "*Us et Coutumes de la Mer, ou Collection des Usages Maritimes des Peuples de l'Antiquité et du Moyen-Age*," Paris, 1847. In this work

A similar uncertainty as to date applies to the next code of maritime law, the celebrated *Consolato del Mare*, which probably succeeded the Rhodian laws with the interval of at least a thousand years. It is variously attributed to the eleventh, twelfth and thirteenth centuries, some Italian writers asserting that it was known at Rome in 1075, and others that it was not compiled till the reign of Louis IX. in the thirteenth century. The knowledge of the Roman law indicated in its composition induced many writers, among them Sir C. Robinson, to fix its date posterior to the discovery of the Amalphitan table: but the belief, which now seems to be established, that the Roman law was known before the capture of Amalphi, annuls even this chance of an approximation to a correct date. Grotius speaks of the *Consolato del Mare* as containing the constitutions of Greece, Germany, France, Spain, Syria, Cyprus, the Balearic Isles, Venice and Genoa (1). The *Consolato* differs from other maritime codes of the middle ages in being the only one where there are distinct regulations on points connected with the law of nations. We shall subsequently have occasion to remark that its decisions on prize law, besides the concurrence of the States above enumerated, coincided with all the treaties relating to their provisions made during several succeeding centuries; and they agree at present with the maritime code of Europe, notwithstanding many attempts to reverse their regulations.

(1) De Jure, l. III. c. 1, n. 4. See also Sir C. Robinson's "Translation of the Chapters CCLXXIII. and CCLXXXVII. of the *Consolato del Mare* relating to Prize law," (published without a name, Lond. 1800), Advertisement VII. note.

will be found collected together all the passages in Justinian's compilations which seem to refer to these laws. M. Pardessus' treatise may also be referred to for all the middle-age systems of maritime law subsequently referred to in the text.—ED.]

Such assenting testimony speaks much for the wisdom of the compilers of the Consolato, who, in a rude age, established regulations which no more recent discoveries have superseded; and its standing the proof of the experience of perhaps seven centuries, is almost conclusive as to the justice of its decisions, which could only have abided such a test from being coincident with the principles of natural equity, which are immutable.

The laws of
Oleron.

The laws of Oleron are, like the Consolato del Mare, of uncertain date. According to some writers, Queen Elinor (duchess of Guienne, and wife of Henry II. of England), when at Oleron, ordered these laws, which were called the Roll of Oleron, to be compiled. According to others, their compilation is due to Richard I., while others again say he only enlarged them. The language employed is old French, and the earliest copy known is, I believe, that bearing the date 1266, "the Tuesday after the feast of St. Andrews," and having the arms of Oleron (1).

The laws of
Wisbuy.

A similar uncertainty of date attaches to the laws of Wisbuy, which were probably of rather later origin than the laws of Oleron, as it was not till 1288, that the inhabitants of Wisbuy obtained leave to wall and fortify their city. Wisbuy was shortly after this period a town of first-rate maritime importance. Merchants from all parts of Europe resorted thither, and each nation had their separate quarter, with peculiar streets for their shops and warehouses; and all strangers enjoyed the same privileges as the native townsmen. Long after the destruction of the city, the ruins of Wisbuy attested its former greatness. Its laws were recognised not only in the Baltic, but throughout a

(1) See the "Complete body of Sea Laws," &c., above quoted, where the laws of Oleron are inserted, pp. 120—173, [and Luder's Tracts.—Ed.]

great part of Europe; they bear a great resemblance to those of Oleron, so as to make it probable that they were partly copied from the latter, unless the likeness be owing to both codes resulting from one common original. (1)

The laws of the Hanse-Towns bear a great resemblance to the laws of Oleron and of Wisbuy. These laws were made in public assembly, and were published in German in 1597. (2) Like the codes of Oleron and of Wisbuy, they have no provisions respecting prize-law. These several codes are valuable in many of their provisions regarding shipping, such as salvage, and average, which have formed the basis of the laws on these subjects at present existing in Europe. But if such provisions evince the wisdom of the compilers of these codes, not less do the regulations in other parts confess the barbarism of the times which rendered some of their enactments possible. Not to mention the use of torture permitted by the Rhodian laws, and the loss of the hand to which the laws of Wisbuy condemned the mariner who struck his captain, unless compensated by fine, the frequent and severe denunciations against wreckers shew how general, in those times, was a barbarity which has been the crime of a few in our own days. By Art. xxv. of the Laws of Oleron, it appears that pilots, undertaking to convey ships into harbour, were sometimes in league with the lords of territories which they passed, to cause the shipwreck of the vessel for the sake of the plunder which would ensue. By Art. xxvi. "if the lord of any place be so barbarous, as not only to permit such inhuman people, but also to maintain and assist them in such villanies, that he may have a share in such wrecks, the said lord shall be apprehended, and all his goods confiscated and sold, in

The laws of
the Hanse-
Towns.

(1) See for the Laws of Wisbuy, (2) *Id.* 194—206.
id. 174—190.

order to make restitution to such as of right it appertaineth; and himself to be fastened to a post or stake in the midst of his own mansion house, which being fired at the four corners, all shall be burnt together; the walls thereof shall be demolished, the stones pulled down, and the place converted into a market-place for the sale only of hogs and swine to all posterity." (1) A similar detail of punishment, obviously a vindictive return for cruelties actually practised, is found in Art. xxxi. "If a ship or other vessel happens to be lost by striking on some shore, and the mariners, thinking to save their lives, reach the shore in hope of help, and instead thereof it happen, *as it often does*, that in many places they meet with people more barbarous, cruel, and inhuman, than mad dogs, who to gain their monies, apparel, and other goods, do sometimes murder and destroy these poor distressed seamen; in this case the lord of that country ought to execute justice on such wretches, to punish them as well corporally as pecuniarily, to plunge them into the sea till they be half dead, and then to have them drawn forth out of the sea, and stoned to death." (2)

Frequency of
reprisals in the
middle ages.

The numerous instances in which reprisals are mentioned in the diplomatic remains of the middle ages which have reached us, are again examples of the frequency of outrage and the difficulty of obtaining justice. A curious example occurred in 1326. The admiral of James II., king of Arragon, seized a French ship and sold it; not with the slightest colour or pretext of justice, but with the express purpose that by the proceeds of the sale he might obtain funds for carrying on war. James II. wrote to Charles IV. of France, stating the fact, and requesting that reprisals might not be allowed against him, inasmuch as he had promised

(1) *Id.* p. 153.

(2) *Id.* p. 161.

the owners of the vessel to re-imburse them in three years, as the exhausted state of his treasury prevented his doing so immediately. The king of France acceded to his request; and the correspondence conveys the impression, that a king, in those days, would gratify a brother king at the expense of his subjects, where his own interest and honour were not concerned, nearly as easily as a man, at the present day, permits another to shoot over his estate. (1)

But the account that has been given of the rude manner in which what was acknowledged as a Law of Nations existed in the middle ages corresponds with what would have been expected from all that history has taught us of the semicivilized condition of society at that period: when knowledge was obscured in almost total darkness, and liberty, instead of being felt by nations, can barely be discovered in its germ by the antiquarian; when the best governments were despotisms mildly administered, and when law was gradually struggling into supremacy, not in the province of security against the governors but in that of justice among the governed. It is not to such a time that we must look for the development of principles dependent on considerations of abstract equity. But the middle ages have nevertheless a considerable influence upon the law of nations as recognised by civilised governments at the present day. For much of that law, like our common law, depends on practice constantly existing; and the middle ages originated precedents on various international questions which have been followed ever since, though often much varied and modified. Such customary law will be more fully considered in a future chapter, this being merely the place for remarking how little civilised were the times that have afforded us those precedents: and we shall have

Strict observance of the law of nations not to be expected in the middle ages.

(1) See the Correspondence in Dumont, Corps. Dipl. I. II. 95—97.

to notice several instances wherein the law which we are considering has been unfavourably affected, and involved in some inconsistencies, from being influenced by usages that had their origin in ages when justice between nations was so little appreciated or understood.

The subject not immediately attended to on the revival of letters.

On the fall of Constantinople, in 1453, there followed that remarkable æra so happy in the conjunction of admirable scholars with most liberal patrons, whose fostering care was needed by the circumstances of literature, but happiest in the newly discovered art which made the results of their labours of easy circulation and attainment. It is an æra well characterised in the usual phrase of the "revival of letters," for it is more remarkable for the resuscitation of the great minds of antiquity, than for original works produced by the authors who then existed, though some of these were eminent. This direction of mental energy was fortunate for Europe, whose men of genius, instead of having to rediscover what had before been known, found a full-grown literature awaiting their attention: but it was unfortunate for the science which we are now considering, as no works by ancient authors treat of the Law of Nations, which therefore remained unnoticed amidst the general bursting forth of knowledge on almost every topic of inquiry. And, besides this, Italy, the focus of the light which was spreading over Europe, was from its political condition unapt for the study of such a science; nor can we fancy tendencies, congenial to the reception of considerations of abstract equity, to be common among rulers for whom Machiavel's *Prince**

[* It is, perhaps, scarcely worth while on the occasion of a mere allusion to this celebrated work to re-open the controversy as to its true political and moral complexion. It must be studied in reference to the character and biographical antecedents of the writer, the political circumstances of the time and place, and the literary taste of the epoch. It is prejudging the results of such an investigation to intimate that the work was "proposed as a guide in political action." See Hallam's "Literature of Europe," vol. i. chap. vii.—ED.]

was proposed as a guide in political action. Accordingly, while such rapid advances were made in many branches of literature, no progress can be recorded in the science of International Law.

Suarez, who lived from 1538 to 1617, is the first Suarez. author whose works on this subject have obtained any notoriety, although not the first writer that gave some attention to such inquiries. Sir James Mackintosh, in his *History of the Progress of Ethical Philosophy*, speaks of him as the writer who "first saw that international law was composed, not only of the simple principles of justice applied to the intercourse between states, but of those usages long observed in that intercourse by the European race, which have since been more exactly distinguished as the consuetudinary law acknowledged by the Christian nations of Europe and America." But Suarez himself speaks of this distinction as already recognised by previous writers: "Neque ab hac sententiâ dissentiunt Juristæ, qui jus gentium distinguunt in *primarium* et *secundarium*, et prius dicunt in *jure naturali*, posterius vero esse *positivum humanum*." (1) And this position he supports by references to writers by whom this distinction had been made. Previous authors had therefore existed, whose writings are now unknown; while Suarez, in the luck of fame, bears usually the reputation of being the originator of the correct method of studying international law. His work is entitled *De Legibus ac Deo Legislatore*, and it treats of the formation of laws and the nature of moral obligation. But notwithstanding the astonishing learning which his pages evince, Suarez is not now worth consulting, unless from curiosity; and curious his Treatise certainly is, from the vast reading which it displays in its author; reading so profound that we

(1) Suarez, *De Legibus ac Deo Legislatore*, lib. II. c. xix. s. 4.

cannot help respecting it, although its results are now useless ; the questions discussed by Suarez having since been much more satisfactorily debated under the improved philosophy of later times. But this must not produce an ungrateful forgetfulness of how valuable, for his age, the labours of Suarez really were. His works were published at Venice, in twenty-three volumes folio, between 1741 and 1745, and his reputation at the present day seems influenced by the bulkiness of his productions, which prevents his being usually read, and prevents his being totally forgotten.

Next to Suarez comes Albericus Gentilis, who lived during the last half of the sixteenth century. (1) His father was an Italian physician, who embraced Protestantism, and sent Albericus to England, where he became professor of civil law at Oxford, about 1582. He was patronised by the celebrated Earl of Essex, to whom his Treatise *De Jure Belli* is dedicated. In this treatise Gentilis considers the right of making war, and the conduct to be observed during war regarding prisoners, hostages, and other similar questions. His work, although now completely superseded, must have been interesting to men of the age in which it was published ; especially as, according to the declaration of Gentilis, his was the first treatise of the sort in existence. Besides the treatise *De Jure Belli*, Albericus Gentilis wrote a work, entitled *Hispanica Advocationis libri duo*, a posthumous publication, edited by his brother ; who informs us, that this was the only essay, among several manuscripts on jurisprudence, which Albericus would allow to be published. On the occasion of James I. remaining neutral during the war

(1) According to Ompteda from 1551 to 1611, Litteratur, I. 168.*

[* See the valuable lecture on Gentilis by Professor Holland, delivered at All Souls College, Nov. 7, 1874 (Macmillan).—ED.]

between the king of Spain and the Low Countries, a great number of cases, in which Spanish interests were concerned, came before the courts of this country, and Albericus Gentilis was appointed, by the Spanish ambassador, official advocate in such causes in behalf of the Spaniards; and hence the title of his work, which was, I believe, first printed in 1613. His discussions on different topics of prize-law are valuable to the student, even at the present day. The study of the Roman law sharpened his judgment for all questions where rights were involved; and, although not dependent on any systematic knowledge of international law, the decisions of Gentilis usually correspond with those of more recent times. His opinions on contraband of war, on captures in a neutral territory, on prizes made after the conclusion of peace, and on the goods of enemies laden in the ships of neutrals, have obtained the sanction of our courts of admiralty in almost every particular. And this is saying a great deal for Albericus Gentilis, for it is no slight merit for the first writer on a new subject to have judgment and penetration sufficient to carry him at once to correct conclusions.

Any of my readers who may have traced the history of any science, or of any discovery, must have remarked how difficult it is to allow to any person the full merit of originality. Vague germs of the ideas which we find perfected and adapted to action are discernible in the writings of preceding authors, and these again have still further predecessors in the same train, so that the earliest notions discoverable strike us as probably not original in themselves, but only as the earliest that occur to our research. It is so with the celebrated treatise of Grotius. But such undefined surmises after truth hardly impair the originality of a great writer; and although we may be able to trace the influence of remote associations, yet enough of the creative power of

genius still remains for our admiration ; and the assistance which such vague suggestions can afford is so slight, that though they affect the fact, they leave untouched the merit, of originality. Such merit belongs, I think, to Grotius, who, if I may be allowed the illustration, gained no more from the writings of preceding authors than our own greatest dramatist did from the old tales which formed the basis of his plots. The works of Gentilis, by which Grotius allowed that he profited, may have afforded him a few examples, but could never have suggested his system, and are remote from the scope of his purpose. Other writers are mentioned by Grotius as having written on the rights of war, as Victoria, Henry of Gorcum, Matthæus, Johannes Lupus, Franciscus Arias, Johannes de Lignano, Martinus Laudensis, and Balthazar Ayala. Of whom Grotius reports, that "*hi omnes de uberrimo argumento paucissima dixerunt,*" observing no system, and blending divine, civil, and canon law, in indiscriminate confusion.

His adaptation
to his times.

To Grotius then is due, I think, the merit which is usually accorded to him, of having been the originator of that which, unaided, he permanently established as a science in Europe. He had the happiness of being exactly adapted to the times in which he lived, for had he lived much earlier he would have found Europe unfitted for the reception of his doctrines ; and his times required a mind like that of Grotius, the new relations of the European powers needing reference to settled principles for their guidance. What I mean will be obvious to those who are acquainted with the discussions on international questions in the reigns of Elizabeth and James I., where they will find positions laid down that are sometimes correct, sometimes erroneous ; but where it is obvious that in all cases a customary law was nearly all that was thought of by the states-

men of those times, no settled principles existing whereby to test those customs, or to serve for guidance where precedent failed.* The wars, too, consequent upon the Reformation, which were fully as much political as religious, developed those new relations of the Christian powers, of which some rude traces are observable in the rivalries of Charles V. and his contemporary monarchs, and in the jealousy of her neighbours shewn by Elizabeth; but which now began to assume their present aspect of a system of which the various European powers are components, demanding an ascertained precision in those national rights and duties made of more frequent controversy by this nearer intercourse. That this estimate of Grotius is not exaggerated may be shewn from the value which was placed upon his works by his contemporaries. It was regarded by princes and ministers as of first-rate importance, especially by Gustavus Adolphus and by Oxenstiern; and it attracted the attention of the most eminent men of letters in all countries. So great was the notice taken of the work, that within fifty years from the death of its author an edition was published with *variorum* notes, in the manner of the ancient classics, an attention never before shewn to any modern production. Ompeda gives an account of forty-five different editions of the work published before 1759, (1) and of these twenty-three appeared in the half century after the first publication of the work in 1625. And the Elector Palatine, moved by the consideration of this treatise, deemed the study so important that he caused public lectures to be delivered on the subject at Heidelberg,

(1) *Litteratur des Völker-Rechts*, II. 392.

[* See chap. xvii. of Mr. Ward's *Enquiry into the Foundation and History of the Law of Nations in Europe*, on the history of the Law from the fifteenth to the seventeenth century; also the Debate on Naturalization in the House of Commons in the 4th year of James I.'s reign. (Parliamentary History of England, vol. i.)—ED.]

where Pufendorf became the first professor of the science.

The method of
Grotius.

It is no detraction from the merit of Grotius to say, that a work so admirable for his own times is incomplete in view of the progress which the science has undergone during the two succeeding centuries. Any diminution of his fame, arising from such a source, is immediately counterbalanced by the remembrance of how much of his work is applicable at all periods, and that it is still, what it has been ever since its publication, a standard authority for reference in the disputes of nations. The defect of his method has been remarked by many writers. Instead of establishing the foundations of right, and then referring his various questions to those principles, he proceeds to the discussion of different points, only mentioning incidentally the principles by which these points must be determined. This is not only a fault in method, but it is a defect which sometimes leads him into false conclusions. I would instance his decision regarding the slaying of women and children in war. Were any one now asked if this were allowable, a negative answer would be immediately returned. But Grotius maintains that such a right does exist according to the law of nations; and this opinion is maintained by nothing but such curious support as a passage from Homer, and by the quotation of the words of the Psalmist, "Blessed shall he be who taketh thy little ones and dasheth them against the stones." (1) From these passages, and a few other citations of instances where such cruelties had been perpetrated, Grotius concludes, that "*jus hoc offendendi etiam ad infantes et foeminas porrigi.*" In a subsequent chapter, respecting "*temperamentum circa jus interficiendi in bello justo,*" he says, that mercy should be

(1) De Jure, lib. III. cap. 1v. s. 9.

shewn to such, as well as to husbandmen, tradesmen, clergymen and others. (1) Here, therefore, he has arrived at a right conclusion; but this again is supported by quotations from poets and historians, and not by a deduction from the immutable principles of justice; mention being merely made incidentally in a different part of the chapter of that which is the real criterion of the question, namely, that we have no right to kill any one, unless by way of punishment, or to avoid some greater evil, as when we cannot protect our lives or property without such violence. (2) Similar are various other parts of his work, as that wherein he maintains the right of a father to sell his child when he has no means of supporting him. (3) Had Grotius reverted more frequently to the original principles of justice, he would not have fallen into these errors; but we must remember that the system of philosophy in those days was, compared to that now existing, what mechanics were before the invention of the lever. The master-minds of that age were ignorant of the use of that principle, utility, with which every member of every petty debating society is now conversant. And to counteract any unfavourable impression arising from such comparison with a later age, let it be considered what would be the results of a mind like that of Grotius, if in action at the present day, from the vantage ground afforded by the progress of enlightenment and the advance of moral science. His astonishing learning, and the happiness with which he calls up the different portions of his vast stores just as they are wanted; his eagerness after truth, and that exact attention to rectitude in his own life which cannot but sharpen the perception of what is just in the morality of nations, this union of qualifications, which must render a man great in any times, would at the present day have made the results of the

(1) *De Jure*, III. cap. XI. s. 9.(3) *Id.* lib. II. cap. v. s. 5.(2) *Id.* lib. III. cap. XI. s. 2.

powers of Grotius of the highest eminence. As it is, under the many disadvantages of his times, Grotius has bequeathed a name that will be remembered with admiration as long as respect follows scholarship, or as long as veneration is insured by an adherence to principles, never swerved from under persecution, and an integrity that was preserved unblemished under the trial of long-continued misfortune.

The style of
Grotius.

The style of Grotius has been mentioned by different critics with the extremes of approval and reprobation. Sir James Mackintosh has replied to the objections of Paley, and has applauded the citation from the classics, in that character of Grotius which is one of the most eloquent panegyrics in our language. (1) I am compelled to differ from him a little in his conclusions. If it were merely an affair of taste I might not object to those constant quotations from the poets, historians, and philosophers of antiquity, which abound in the *De Jure*: the feeling that they are redundant might be passed over in the remembrance of the little likelihood of this style being imitated; and the pleasure given by their perusal is an argument in their favour whenever they do not divert the mind from the real purpose of the discussion. But it is not merely as ornaments that these quotations are introduced: the fault of the work of Grotius is, that although he made so great an advance in establishing correct principles of national conduct, he leaned to precedent, not with implicit reliance, but with a bending to authority which is characteristic even of the freest spirits of his age. His age was but recently emancipated from the trammels of a mental despotism; religion was just emerging from the authority of the church, and learning from the discipline of the schools; and we find a deference to

(1) Discourse on the Study of the Law of Nature and Nations, 20 - 27.

authority existing even among reformers in those times, which is in strong contrast with the abstract love of novelty that has been common in the great political convulsions of the last half century. But Grotius, who appears to us too often contented with a precedent where he should have consulted a principle, was regarded as a great innovator in his own times, and his work was inserted in the *Index Expurgatorius*, because of the dangerous tenor of its novel doctrines. By this constant reference to his age, I am not, I hope, endeavouring to produce an undue favour for Grotius: I trust that I have only that tenderness for his reputation which a student must ever feel for the memory of so great a scholar.*

Sixteen years before the publication of the *De Jure*, Selden. Grotius published, in 1609, his *Mare Liberum*. It was answered by Selden, in his Treatise entitled *Mare Clausum*, a work of amazing erudition, but one where the faults of the method of Grotius are displayed in their fullest extent. The quotations from the classic poets, from the works of philosophers, from ancient records, and from books of law and of history, are really astonishing from their number and variety; some of them are very curious, and some are very interesting, and they convey a high notion of the extensive reading of the author, but they are not, what all illustration

[* The edition of Grotius' great work *De Jure Belli et Pacis*, published by Dr. Whewell, late master of Trinity College, Cambridge, in 1853, is a valuable help to English students. It is accompanied by a translation, and by notes of the "author, Barbeyrac, and others." The publication of this work in so attractive and serviceable a form is only one of many important aids rendered by the illustrious editor to the study of the Law of Nations. The reader is recommended to supplement the account of Grotius and his work given in the text by a reference to the estimate and summary account of the *De Jure Belli et Pacis* given in Hallam's *Literature of Europe*, vol. ii. part iii. ch. iv.]

should be, to the purpose. So often is this the case, that the reader is sometimes tempted to suspect Selden of endeavouring to bewilder his antagonists by a practice similar to what he mentions as then usual in naval warfare, namely, throwing dust into the air to be blown into the eyes of your adversary: and his vast citations tell against, rather than for, the writer's views, suggesting the idea that the cause must be weak for which such laborious research could discover no better supports. The first part of the work is almost wholly composed of arguments grounded upon such unsatisfactory foundations. The second part is rather more conclusive, the evidence adduced being more in point, and consisting of quotations from more modern instruments in which the British claim to the sovereignty of the seas is mentioned. This subject will be discussed more at length in a future chapter. Of the two works, that of Selden is the most learned, but that of Grotius is the most convincing; indeed I prefer the composition of the *Mare Liberum* to any part of the *De Jure*. The *Mare Clausum* and the *Mare Liberum* are not opposed so diametrically, as their titles might suggest: both writers allow that parts of the sea may become the subject of exclusive dominion, and neither contemplates the sovereignty of the entire ocean being claimed by any individual state. It is a question of degree upon which they are at issue, and this has been better settled since their time. Shortly after the publication of the *Mare Clausum*, Selden was attacked by one Burgus, who accused Selden of bad faith in writing this treatise, which Burgus asserted was written to obtain favour with the ruling powers, and to procure Selden's liberation from imprisonment: Selden wrote an indignant reply, in which he declared that this treatise, although published in the reign of Charles I., had been written in the reign of James I., and he abused Burgus in more hard words than I was before aware existed in the Latin language,

all wound up to the superlative degree. Suarez, Selden, and, much as he was in advance of his times, in some degree Grotius, are examples of an old class of scholars long extinct, or only leaving faint traces of their habits remaining in some German university. Their immense research, and the profound erudition consequent upon their vast labours, can scarcely be understood by those who have not perused their writings. But their hardly credible learning was without results commensurate with their industry; they lacked the mental process which turns knowledge into wisdom; and their writings are at the present day of so little value, as often to produce in the reader quite a painful feeling of regret for their wasted labour. They are in letters what the pyramids are in architecture, astonishing from their vastness, and from the immense labour requisite for their completion, but are now only monuments of lost power, and exist as interesting, but useless, curiosities.

Following a chronological order, we next find the Dr. Zouch. works of our countryman Dr. Zouch, whose treatise *De Jure Feciali*, was, I believe, originally printed in 1650. It is divided into two parts, in the first of which, entitled *De Jure inter Gentes*, he considers the general obligations of the law of nations; and in the second, entitled *De Judicio inter Gentes*, he considers separately different questions of embassy, commerce, and war. He also wrote another treatise, entitled *Juris et Judicii Fecialis sive Juris inter Gentes et Quæstionum de eodem Explicatio*. The works of Zouch are full of historical illustration, but they have the too frequent fault of legal writers, bending too much to precedent and authority. His treatises have neither the system nor the scope of the work of Grotius, being rather a collection of detached essays, than a work in which the different topics are considered as branches of one whole system. But they must have been valuable abstracts.

at the time of their publication; they discuss many practical questions of great interest, which are only briefly noticed by Grotius; and they are still useful, as shewing, from an undoubted authority, what passed current in those times as the rights and duties demanded by the law of nations. (1)

Pufendorf.

The error which we have remarked in the method of Grotius was remedied in the treatise of Pufendorf. Grotius, collecting from history the customary law of nations, sometimes misleads us by presenting, for imitation, precedents that never should have occurred. Pufendorf goes to the contrary extreme. He devotes his pages to the inquiry of what abstract right demands, and he will admit nothing else as authoritative on the law of nations. Grotius inquired what the practice of nations had been—Pufendorf what it should be. Though the former discovered and promulgated right principles of moral action, yet he seems to have been afraid of the great innovation of pursuing his principles to their full extent; and frequently, after laying down correct principles, he derives what he declares to be the law of nations from some flimsy authorities, whose decisions are sometimes opposed to equity, and who ought never to have been thought of as models for the guidance of states. Pufendorf, on the other hand, will allow no force whatever to the customary law of nations, and the

(1) The edition I have used was printed at the Hague in 1659, but I believe there was a previous edition published in England. Zouch (latinized into Zouchæus) also wrote *Elementa Jurisprudentiæ*, and likewise a treatise on the *Jurisdiction of the Admiralty*, published in 1663. The former of these works does not concern the Law of Nations at all,

and the latter not much. Zouch claims a much more extensive jurisdiction for the Court of Admiralty than is now allowed, demanding the right of cognizance of all contracts made on land respecting navigation and trade at sea: just the reverse is now the case, contracts made at sea being cognizable by the Court of Queen's Bench.

Jus Gentium he declares to be solely determined by the law of nature. (1) Thus the inviolability of ambassadors he allows as part of the law of nations; but many privileges universally allowed to ambassadors he does not admit as part of that law. Grotius and Pufendorf thus tended to errors of an opposite description. Grotius, not proceeding from a settled basis, falls into the error of sometimes justifying what is unsustainable by reason, by appealing to constant practice as the rule of right. Pufendorf, denying the sanction of the law of nations to any claim that cannot be deduced from the principles of abstract right, would introduce confusion by a disregard of the settled rules of intercourse. Each system is incomplete in itself, and needs the support of the other. In going from the writings of Grotius to those of Pufendorf, the reader feels that he has passed to the pages of a more reasonable writer, though of a less striking genius. The work of Pufendorf is confessedly based on the treatises of Grotius and of Hobbes, and his writings are certainly improvements on the works of both those authors. An acquaintance with the works of Pufendorf was once esteemed part of the course of a liberal education; but, from the improved method in which ethical questions are now discussed, his writings are seldom consulted at the present day, unless by students as an example of an obsolete system, or occasionally for some state-paper where his opinion can be introduced. I confess that I found the study of his work very tedious, and of no great benefit; but the justice of his conclusions, although arrived at by a method now completely superseded, makes it always

(1) See Pufendorf *De Jure Naturæ et Gentium*, lib. II. c. III. s. 23. This work was first published, according to Ompteda, in 1672. Pufendorf had previously

published *Elementa Jurisprudentiæ Universalis*, in 1660; and a minor work, *De Officio Hominis et Civis*, appeared in 1673.

a point for a statesman when he can display on his side the authority of Pufendorf.

Writers subsequent to Pufendorf.

The incompleteness of Pufendorf's system for guidance in international relations attracted the notice of several writers, of whom the first was, I believe, Samuel Rachel, who had been professor at Helmstadt and Kiel, and who was afterwards minister of Holstein-Gottorp during the negotiation of the treaty of Nimeguen. His work, which appeared in 1676, is hardly known, even by name, in this country, and I have not been able to obtain a copy of it. From the account of the work given by Ompteda and Klüber, it must have been a valuable essay for that period, (1) vindicating the necessity of studying the customary law as part of the law of nations, and combining this with the consideration of the law of nature as applied to states. Before Rachel, Dürr and Uffelman, and after him Pompeius, Zentgrav, Werlhof, Von Ludewig, Textor, Thomasius, Griebner, Glafey, Köhler, Reinhard, Stapf, Struv, and Ickstadt, produced treatises on the subject of the law of nations. Of some of these writers even the names were unknown to me till I met with them in Ompteda, and the others I had merely seen quoted in the margin of some German writer, excepting Thomasius, whom I once found referred to in a Russian memorial. The account of these writers given by Ompteda is not such as to invite a perusal, nor does it seem advisable for a student to loiter over the productions of this period. Their number, variety, and opposition, shew at once that the science was attracting attention, and that it was still in a very unsettled condition. The treatises, interesting from their connexion with the dawn of the science, had been published before this time, and the

(1) Ompteda, *Litteratur*, I. 276—283. Klüber, *Droit des Gens*, I. 24, note (c).

works most valuable in ascertaining the principles of the science, and in collecting the historical precedents relating to it, have been published since that period.

But one writer of the latter half of the seventeenth century deserves more attention, Leibnitz, who among his almost universal researches gave some of his time to the law of nations. Of his *Codex Juris Gentium Diplomaticus* the first part was published in 1693, and the second part in 1700.⁽¹⁾ This work was a collection of every description of state-papers, the public and private agreements of sovereigns, national treaties and matrimonial contracts, public edicts, papers on commerce and navigation, declarations of war, forms of investiture and of deposition, of elections, of public ceremonies, of confiscations. Besides an attentive consideration of the collections of public acts then extant, Leibnitz informs us, in the Dissertation prefixed to the second part of the *Codex*, that he was assisted in his task by statesmen and men of letters in various parts of Europe, who forwarded to him manuscript copies of state-papers never before published. His *Codex* was a valuable addition to the science of the law of nations at that period, but it is now superseded by the greater value of more recent works, in which the instruments in the *Codex* are embodied. His two preliminary dissertations are, however, well worth perusal, the first as containing many valuable opinions on the subject of the law of nations, and the second from the account it gives of the collections of treaties then extant. Leibnitz did not himself attempt to establish any system of international law by induction from public acts, his work being merely a collection of materials for such a purpose. Had he chosen to engage in such a pursuit, his treatise published under the assumed name of Cæsarinus

(1) Leibnitii Opera, ed. Dntens, Geneva, 1768, tom. IV. 285, 286.

Furstenerius makes it probable that the result of his studies would have been very valuable. The Treatise referred to was occasioned by the refusal of some of the ambassadors at the treaty of Nimeguen, in 1678, to allow the same ceremonies to the plenipotentiaries of the princes of the empire, not being electors, as was allowed to the representatives of such Italian princes as the Dukes of Mantua and Modena. It is curious to find such a mind as that of Leibnitz applied to the discussion of a debated point of etiquette, which seems more fit for the doubts of a master of the ceremonies, than for the deliberations of a philosopher. But Leibnitz gives nearly two hundred quarto pages of Latin to the subject, and really invests it with a sort of dignity from the skill and learning which he brings to his task. He exhibits great research into historical precedents, of which he makes a happy application, insisting with great force on the analogies which he brings forward; but the most remarkable characteristic of the work is the number of valuable opinions, and finely expressed sentiments, which are found intermixed with most curious facts, scattered about the treatise. Some of these will be subsequently quoted. The work of Leibnitz strikes the reader as the production of a rich and well-stored mind, that excited interest, and conveyed information, even by the incidental objects of its pursuit.

Heineccius.

In 1721 Heineccius wrote his treatise *De Navibus ob vecturam vetitarum Mercium commissis*. It was the most valuable treatise on the Law of Nations, as respecting maritime captures, that had then been published. Heineccius treats his subject with a constant reference to the principles of abstract right, at the same time that he considers the details of practice; and the decisions which he has pronounced regarding questions of prize, have obtained a deserved weight as legal

authority. He was a philosophical lawyer, whose acquaintance with business made him always think of principles with a reference to their application in practice, while his studies on the foundations of right gave him comprehensive views in his reasonings on international equity. His *Elementa Juris Naturalis* was translated into English, in 1763, by Dr. Turnbull, who has contributed some valuable notes. It is an excellent work, and is as superior to its predecessors in the same course as the work first mentioned is to the previous treatises on prize law. It is curious to remark how near Heineccius was to using the principle of utility as a test of moral action. He says that the law of nature is identical with the will of God; that to ascertain the former we must explore the latter; and that the will of God is, that all men should be happy. (1) Thus he has actually stated the basis of the principle of utility as the index to the law of nature; but he does not keep this principle in sight, and arrives at his conclusions by a circuitous route, after he had actually discovered a readier method. Still his works are worth consulting at the present day; especially the treatise *De Navibus*, &c., which should form part of the course of every student of the law of nations.

Contemporary with Heineccius was Bynkershoek, Bynkershoek. whose writings on international law were rather posterior to those of the former author, the *Questiones Juris Publici* having been published in 1737: the treatise *De foro Legatorum* had been published previously, I believe in 1721. Bynkershoek, like Heineccius, was a jurist of the greatest eminence, and his writings on the law of nations are some of the most valuable that have appeared. He is one of the most convincing reasoners that have ever written on this subject; his writings are profound, and his arguments

(1) Lib. I. c. II. §§. 77, 78, 79.

serried; but he is always clear, from the mastery which he appears to have of his subject: everything is straightforward, with a complete absence of any artificial mysticism, and his works have the delightful attribute of seeming to be written from a love of the subject, and not with a reference to their author. His command of legal and historical illustration is very great, but his illustrations are always in point, and he does not fall into the error, which we have to lament in previous writers, of burdening his pages with superfluous quotations. Strong sense, and a healthiness of mind and feeling, are the characteristics of Bynkershoek: he keeps equally aloof from visionary theories and from subserviency to precedent, and constantly appeals to *juris gentium magistra*, *ratio*, testing the practice of States by the reasonableness of their decisions. He has a vein of dry humour occasionally introduced, which, however, relieves without interfering with the gravity of his matter; as, where he speaks of the controversy regarding tobacco being contraband of war, which he says "went off in smoke," in *fumum abierat*. His *Quæstiones Juris Publici* had been written, although not published, before he had seen the treatise of Heineccius, as Bynkershoek expressly informs us; and the decisions of these two writers receive a mutual support from their unconscious agreement. Bynkershoek enters into the details of practice more than his contemporary: his discussions on questions of prize are always satisfactory, and his decisions seem usually to be final, from the clearness with which he perceives the various bearings of his subject. It is with reason that his opinion is always regarded as a most weighty authority upon the law of nations. It might be inaccurate to say that he made law; but, like Mansfield and Stowell, his perception of right enabled him to discern what should be law, and the clearness with which he established his decisions gave a fixed settlement to principles that had before been but half ascer-

tained. This characteristic of Bynkershoek places him in the same class with the great lawyers whom I have named, with whom I think it no diminution of their fame to rank Bynkershoek, though his mental character was inferior in some respects, especially in refinement, to that of the great British authorities whom I have mentioned.*

Christian Wolf, who occupied so large a share of the Vattel. attention of his contemporaries, is now seldom heard of, nor have I ventured to attack the eight quarto Latin volumes which he published on the Law of Nations. Wolf is now principally known through the means of his disciple and abridger, Vattel, whose work on the Law of Nature as applied to nations, is of acknowledged value. The treatise is not so much characterised by profound research, though his reading is extensive; nor by novelty of design, although in this he is superior to his predecessors; as by the high tone of feeling and high standard of morality of its author, who appears constantly impressed with the responsibility of his undertaking, and with the desire of doing good by his writing; or, as he himself expresses it, of being the "friend of nations." It is this which makes Vattel so valuable an authority: he writes with the free spirit of his native Switzerland: his mind seems above the influence of debasing impressions, and he is always an unbending standard of right, never flinching from the conclusions which he believes that justice dictates. At the same time he is no visionary, who, with a standard of unattainable perfection, like Volney, wishes mankind to conform to a fanciful theory. He is equally distinct from that class of writers on morality who delight in metaphysical abstractions, whose chain of argument is

[* For an account and estimate of Hübner, and of his work on the seizure of neutral vessels, published in 1769, see *post*, in the chapter on *Belligerent Goods in Neutral Ships*.]

so subtle that the connecting links are indistinct to common vision, who seem happiest when in a mental labyrinth, and whose works are much more ingenious than useful. Vattel, on the contrary, treats of natural law as a science that requires, both in the professor and in the student, a sound understanding and a healthy state of moral feeling, rather than an aptitude for subtle refinements. And in this I think him right; for the science of morality, public as well as private, is such that a clear explanation may expose all its positions in a state fit for the judgment of men of the common sense order of capacity. Vattel has done for the morality of nations what Paley did for the morality of individuals: both wrote, not so much for professed scholars, as to inform and enlighten the mass of mankind. They are by no means proof against criticism, which may detect inaccuracies in their definitions, and occasionally fallacies in their arguments; and both are thus obvious to that unfair criticism which insists on the defects of authors, while taking no notice of their merits, and thus produces a false impression, while truth is verbally adhered to. Both Paley and Vattel are remarkable for their love of considering those questions in their science which relate to the actual concerns of men, rather than those doubtful points which are of less probable occurrence, but which afford greater scope for subtle argument: both are happy in the masculine character of their minds, their vigorous style of reasoning, and the straightforward manner in which they state their questions: both are remarkable for their clear and nervous language, and the appositeness of their illustrations; and, I believe, both acted under that highest of impulses, the desire of benefiting their fellow men.

Scope of the
plan of Vattel

It has been already remarked, that Vattel occupies much of his treatise with considerations which do not require discussion at the present day, as the right of a

State to levy taxes, to coin money, to make roads, to protect property, to punish offenders, and so forth. But these disquisitions, useless at the present day, may have had their value in the lower state of political knowledge existing when Vattel wrote. Nor must it be imputed as a fault to Vattel that his treatise is not a complete work on the subject of the law of nations, as he expressly confines himself to one branch of that science, namely, the Law of Nature; or, as he calls it, the *necessary* law of nations deduced from "the nature of things, particularly of man and of political society." Of the *voluntary* law of nations, depending upon custom, treaties, or tacit agreements, Vattel expressly declines all cognizance. Now, at the present day, this latter is a very important branch of international law, perhaps the majority of cases where politicians are at issue being decided by this "voluntary" law of nations. But the study of the "necessary" law, or the law of nature applied to nations, is nevertheless indispensable; and on this branch I consider Vattel the first authority for reference, and the best guide for the student. Had he lived at the present day he might have seen the incompleteness of his design; as it is we can only regret his self-imposed limitation, and add, that on the branch of the subject to which his treatise applies, his work is the best extant. (1)

Pursuing a course directly the reverse of that adopted Moser. by Vattel, Johann Jacob Moser dedicated himself to

(1) Editions and translations of Vattel's work have appeared in many countries, and in 1834 an edition was published in London, valuable from the extensive notes of Mr. Chitty, who has done much to remedy the deficiency of Vattel, by quoting the decisions of British tribunals on the various questions in the text. Mr. Chitty

does not seem to have gone into the law of nations as a science; no doubt his time has been too much occupied to allow him to pursue such inquiries deeply, but this does not impair the value of his notes as far as they go, and I recommend his edition to the English student.

the study of the law of nations, as elucidated by public instruments relating to the intercourse of States. He was a most voluminous writer, and died in 1785, at the advanced age of eighty-four, after having continually issued works from the press during the long literary career of fifty years. I, who have only twenty octavo volumes of his writings, merely possess those which he began to publish when he was seventy-six. His work entitled *Versuch des neuesten Europäischen Völker-Rechts* (1) is the most valuable of his writings, in which, I believe, he condensed the principal parts of his foregoing productions. The first volume was published in 1777, and the tenth in 1780, and he afterwards issued eight volumes of supplement. Moser does not, in this work, inquire into the law of nations as dependent on moral obligation; he devotes his pages to the state-papers by which the practice of nations is illustrated. The assiduity of his research seems to have been incapable of weariness, and his collection of facts extends into every branch of international relations. His work is incomplete as a whole, having no pretensions to a system, but, as far as it goes, it is very valuable. In the mental division of labour, he chose for himself the office of a collector of facts which he left it to others to employ; and he has well accomplished the purpose that he had in view, having, in his works, bequeathed to students a magazine full of valuable materials.

Valin.

In 1766, Valin published his Commentary on the *Ordonnance de la Marine du mois d'Août 1681*. In this production, taking the articles of the ordonnance as

(1) "Versuch des neuesten Europäischen Völker-Rechts in Friedens- und Kriegs-Zeiten, vornehmlich aus denen Staatshandlungen derer Europäischen Mächten, auch anderen Begebenheiten, so sich seit dem Tode Kayser Carls VI. im Jahr 1740 zugetragen haben, entworfen von J. J. Moser, Königlich-Dänischen Staats-Rath."

a text, he enlarges, in long notes or dissertations, on the subject before him, in a manner that has made his work of standard authority for reference in maritime cases. The chapters in which he treats of prize law are a necessary part of a course on the law of nations; though it is to the statement of the actual practice of France that he confines himself, rather than to an inquiry into the equity of that practice. (1)

Kant has given to the subject of the law of nations Kant. a few pages of his *Metaphysische Anfangsgründe der Rechtslehre*, published in 1797. His essay is very short, but it is frequently quoted by German writers in support of the necessity of a "positive" law of nations. Kant's positions are, that nations, considered with regard to their external relations, are in a state of lawlessness; that this state is a state of war, even where there are no actual hostilities; and that, to emerge from this state, nations should combine to form a general confederacy. By such a union of individual States, Kant would establish a permanent "Congress of States," to which all neighbouring nations should be permitted to attach themselves, but such association should be voluntary, and the union should at any time be dissoluble. To this "Congress of States" all complaints of international wrongs should be addressed, and disputes should be settled by its decisions. By such a congress Kant says, that justice among States might be promoted, and respect obtained for the law of nations, which had latterly been banished from cabinets, and existed only in books: and although it would be visionary to expect a perpetual peace, yet, by establishing such a tribunal for nations, an approximation might be made to that desirable result.

(1) Published at La Rochelle, in 2 vols. quarto.

G. F. De
Martens.

Perhaps the most valuable modern writer on the law of nations was George Frederic de Martens, formerly professor of jurisprudence at Göttingen, afterwards counsellor of state of Westphalia during the reign of Jerome Buonaparte, and finally minister of Hanover at the diet of the Germanic confederation. He published, in 1785, his *Primæ lineæ juris gentium Europæarum practici*, which work formed the basis of his *Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage*. This treatise has gone through a great number of editions, that which I possess being dated Paris 1831, with notes by Pinheiro Ferreira, who has proved himself no friendly commentator, his notes being written in a tone of detraction and even abuse, which tells more against the critic than against the object of his criticism. An English translation, which I have not seen, was published by Cobbett, at Philadelphia, in 1795. The *Précis* of De Martens is the most complete treatise that exists on the law of nations, as recognised by the States of Europe. It embraces every topic of usual discussion on the subject, and embodies a vast store of information, deduced alike from the writings of preceding authors, and from public documents relating to the text. It is perhaps of more frequent reference than any other treatise, and it is valuable to every student; the short account of the subject given in the text offering sufficient information to those who want only a slight view of the question, and the notes affording an index for further research to those who wish to pursue a deeper investigation. The collection of treaties published by De Martens will be considered subsequently, when noticing similar collections. Besides the *Précis*, De Martens published several works, all tending to illustrate the recognised or "positive" law of nations. His *Cours Diplomatique*, which was published in 1801, obtained considerable

celebrity, but it has long been out of print, and I have not been able to obtain a copy of it, after a good deal of inquiry, both here and in Paris. From the account I have seen of its plan and scope, it must have been an interesting treatise, embracing a view of the various laws and conventions, concerning the relations of States, made by the powers of Europe and by the United States. De Martens also wrote an excellent treatise on Privateers, which has been translated into English by Hartwell Horne, with the addition of some useful notes. He also published a history of remarkable events relating to various differences between the European powers. (1) This formed the basis of the *Causes célèbres du Droit des Gens*, published in 1827 by his nephew, the Baron Charles de Martens, a very interesting work, which contains an account of some of the most curious discussions that have occurred respecting the privileges of ambassadors, and regarding the rights of neutral commerce. M. Charles de Martens likewise continued the collection of treaties after his uncle's decease; and he also published, in 1832, his *Guide Diplomatique*, in which he treats of the functions of public ministers, of whose rights and duties his work is a useful summary.

In 1831 John Louis Klüber published his *Droit des Gens Moderne de l'Europe*, of which a German edition had appeared some years before. It is a curious specimen of the results of a class of minds, little known in this country, but of which many examples are found in Germany, minds which are stored with an astonishing,

(1) "Erzählungen Merkwürdiger Fälle des neueren Europäischen Völker-Rechts, in einer Sammlung von Staatschriften aller Art in deutscher und französischer Sprache, nebst einem Anhang

von Gesetzen und Verordnungen, welche in einigen Staaten über die Vorrechte auswärtiger Gesandten ergangen sind." Göttingen, 1800, 1802.

and even uselessly abundant, collection of materials, but which seem to have no power of making a proper application of these materials. With the erudition of a German professor, Klüber has the faults of the cloister, as well as its advantages; his reading is most profound, but his mind seems to have been formed wholly by books. His notes, which are nearly equal in length to his text, and are much more valuable than the text itself, are quite curious, as examples of a man's acquaintance with the stores of one branch of literature. All works that are common, and all that are uncommon, seem to have been ransacked by this indefatigable student, whose quotations are drawn from books of every description, from flimsy modern essays, and from ancient folios seldom taken from the "moth-world," from reverend dissertations on unalterable right, and from the pompous nothings of some "Theatre of Ceremony." But Klüber's references are almost all to books of one class, namely, those which relate immediately to the law of nations. Of history, which should form a marked portion in the reading of every student of the law of nations, Klüber seems surprisingly ignorant: there are hardly any references to works on history in his notes, and his historical facts and precedents are re-quoted from diplomatic works, where the occurrences had been already cited. Klüber's method and arrangement are essentially bad: he classes the law of nations in two divisions, in the first of which he treats of the "absolute" rights of States, or rights which they necessarily enjoy as States; and in the second division he treats of their "conditional" (*hypothétiques*) rights, or rights which result from certain conditions of States, as the condition of war, or of peace. This arrangement would perhaps not be very convenient under any circumstances, but the author's being encumbered with this arbitrary division would have been of secondary consequence, had he not inconvenienced the reader by treating the same subject under

the two different heads ; and thus, instead of finding all that the author means to say on any subject in a single part of his work, the reader finds part of a dissertation in one place, and afterwards, when he is pursuing quite a different inquiry, he comes upon something more in continuation, or conclusion, of a previous discussion. (1) Klüber has no acquaintance with diplomacy beyond what he has gained from books ; and hence, where he has overlooked a fact in his reading, he has no chance of arriving at the truth by any other method. Of this an example is afforded by the mistake he makes of dividing public ministers into three, instead of into four, classes, which every young *attaché* is aware is the present arrangement. Klüber quotes the act of the Congress of Vienna in 1815, and is obviously not aware of the arrangements made at the Congress of Aix-la-Chapelle in 1818. But a much graver objection against Klüber is made by his chapters on maritime captures. Without attempting to controvert preceding authorities, without giving reasons why he opposes what had been practised in Europe for centuries without one remonstrance, he asserts the law of nations to be diametrically the reverse of what has always been acknowledged as such. In speaking, for instance, of the right of search, he says, that as neutrals are free independent States, belligerents have no right to search their vessels, unless they have special conventions to that effect. Now be it remembered, that this is asserted by a writer who is treating of the positive law of nations as at present recognised in Europe. And yet the right of search of merchant vessels, excepting the litigated case of those

(1) Compare, for instance, § 61 and § 134 ; § 100 and § 219. And the classification does not seem very reasonable, as the author gives several sections in ceremonial, under the head of the

absolute rights of States, and gives sections on the rights of a State in its own territory, under the head of conditional rights. See § 100 *et seq.* ; § 127 *et seq.* ; § 179 *et seq.*

under convoy, has never been denied by any writer, nor contested by any State, including the United States, and was not even called in question by the lovers of maritime innovation who formed the two confederacies for an armed neutrality. Klüber is again in error, when speaking of the restrictions placed on commerce by Napoleon's "Continental system" and our own "Orders in Council:" the whole blame of those restrictions Klüber labours to throw upon the British government: he describes us as having commenced them, he accuses us of inventing "paper blockades," and he speaks of the Berlin and Milan decrees merely as "opposed to our pretensions." Now, in speaking of a debated point, like the continental system, esteem for an author is by no means lessened by the mere fact of his differing in opinion, provided his opinion be stated with candour and fairness; but all respect is lost for an author who distorts facts so as to produce an untrue impression; and it is with something of disdain that we detect the spirit of an unfair partisan, in one who aspires to the high office of a judge upon the rights of nations. Klüber is thus no safe guide for the student, whom his *dicta* are as likely to mislead as to instruct; but the information that he has amassed makes his work a desirable addition to every library on international law. It is perhaps not too hard upon the work to say, that, as a general rule, Klüber's materials are valuable, and his opinions are worthless.

Kent.

The American Chancellor Kent, in his *Commentaries on American Law*, gives several of his opening lectures to the subject of the law of nations. They are fine examples of lucid and manly reasoning, and the style in which they are written is perspicuous and forcible, and marks a command of the power and resources of that great bond between our nations, our common language. From the nature of his work,

Chancellor Kent was only able to devote a small portion of his treatise to the Law of Nations: but their brevity is the only thing that is objectionable in these lectures, for all that the author does give us, is valuable.*

An interesting work, entitled *Elements of International Law*, has lately been published by Dr. Wheaton, American minister at Berlin. It is, as its title states, elementary, but the judgment and information it exhibits make it a very useful treatise. Dr. Wheaton was before known as the author of a *Digest of the Law of Maritime Captures and Prizes*, published at New York in 1815, and also by his reports in one of the American courts of law. In this latter capacity he had an excellent training for many parts of the science of which he treats. Both the goodness, and what I hope I may without presumption call the deficiencies, of his work, are in a great measure referable to this course of mental discipline. In those parts of his work which treat of the decisions of prize courts, his book is very complete; but it is the reverse of complete on those questions which are not the subject of such legal decisions. The same remark is applicable to the space which Dr. Wheaton has devoted to the consideration of such subjects as the effects of the municipal law of one country on the subjects of another country; as, for instance, the effect of bankrupt laws, in cases where the bankrupt has had property in two countries, and where creditors in both countries claim shares in the same property; or as to the manner in which marriages, contracted according to

[* The edition of such of the lectures of Chancellor Kent as relate to the subject of the Law of Nations, published in a separate form by Dr. Abdy (late Regius Professor of Civil Law in the University of Cambridge, England), and enriched with much supplementary matter and valuable notes, may be confidently recommended to students. This is the edition which will be referred to in the course of this work.—ED.]

the laws of one country, affect succession to property in another country in which such marriage would not be legal. These subjects are treated in a very satisfactory and instructive manner, but they hardly belong to the law of nations, strictly so called; and they appear to occupy an undue portion of a work of which not quite thirty pages are allowed to that part of international law which affects the functions and immunities of ambassadors and consuls.*

His work
highly in-
teresting.

It is a delicate task for me to criticise the work of Dr. Wheaton, because our treatises may by some be considered to be in a position of rivalry, but I trust that my remarks have not been, in the most remote degree, actuated by any invidious spirit of detraction. The following treatise is written on such a different plan,

[* Since the publication of the first edition of the present work, Dr. Wheaton's *Elements of International Law* have been repeatedly republished, and have had the advantage of being copiously annotated by editors of the high repute of Mr. Lawrence and of Mr. Dana. The work is now, perhaps, on the whole, the most popular text-book on the subject in the English language, though the prominence it gives to the description of cases which have been adjudicated upon by American tribunals, and the somewhat inconvenient way in which the original and more expanded, the older and the newer, parts of the modern work appear side by side, without any attempt having been made to re-construct and digest the whole, renders it less useful than it might otherwise be for educational purposes. The voluminousness of the later editions of Mr. Wheaton's work belie at once the description of it in the next paragraph of the text as a "professedly elementary work," and also its current title as "elements."

The "History of the Law of Nations in Europe and America from the Earliest Times to the Treaty of Washington in 1842," is another most important contribution to the study of the subject by Dr. Wheaton. This work was originally written and printed in French, as a memoir in answer to a question proposed by the Academy of Moral and Political Sciences in the Institute of France, as to the amount of progress made by the law of nations since the Peace of Westphalia. The English translation is unfortunately out of print. The most recent edition of Dr. Wheaton's *Elements* is one published at Leipzig in the French language, by Mr. Lawrence, and of which the 8rd volume appeared in 1873.—ED.]

and with a scope of purpose so distinct from that of Dr. Wheaton, that I do not consider that the two productions interfere with each other. Dr. Wheaton has written a work professedly elementary, and in which some parts are besides finished in a most instructive manner: he has cultivated the department of the subject which he had selected for his occupation, with results that must afford pleasure and information to all who peruse his pages; and no one has a right to complain that he has not chosen a wider field, or devoted his time to a more laborious production. The interest derivable from his work is not such as merely to concern professional lawyers, but political students of every class will derive satisfaction from his pages. Dr. Wheaton's work is the best elementary treatise on the law of nations that has appeared, and it leaves the impression that the author's abilities might, had he so chosen, have given, with advantage, a fuller insight into the science which he illustrates.

One great name must here be mentioned, that of Sir Lord Stowell. William Scott, Lord Stowell, whose decisions on matters of prize, in his capacity of judge of the Court of Admiralty, must ever form an important part of a course of study on the law of nations. Never was a man better adapted to his station: and the functions of his office at that period demanded exactly such a man. In a war of unprecedented acrimony, and of a magnitude that comprehended in its influence the whole civilised world, he held the office of arbiter in cases in which the disputed rights of nations, his own included, were litigated. He united all the faculties demanded for the satisfactory fulfilment of his important duties. His knowledge of his subject was unequalled, but his learning was never cumbersome, and he always seemed to bring forward the exact portion required by the occasion before him. He was gifted with a remarkable penetration, which

enabled him to see through the ingenious contrivances of pretended neutrals, and to elicit what every one felt to be the truth of the case, from a maze of fraud that seemed at first to be complete for its purpose of deception. In his reasoning he was equally successful in an exact and cautious induction from facts, and in the able application of general principles to individual cases. His mind seemed unsusceptible of bias: he was impressed with the great responsibility of his functions, which demanded constant self-watchfulness in a judge whose own country was concerned in his decisions. He seemed always to follow the inflexible rules of justice, with the feeling which he expressed, when giving judgment in the Swedish convoy, to decide in London as he would if he were sitting at Stockholm, claiming nothing for his own country which he would not allow to her if he were a judge in Sweden. In the vast number of novel cases which came to him for decision, he so applied principles already acknowledged, as to make his judgments form a consistent part of the law of nations, at the same time that he carried out that law further than it had been heretofore explored; and the manner in which he enunciated his decisions has made his judgments of constant reference for the principles which they embody. The respect which his capacity commanded was not confined to his own nation; a judge of a country that was subject to great vexation from our restrictions upon commerce, the American Chancellor Kent, has borne this remarkable testimony to the satisfactory character of Lord Stowell's judgments: "There is scarcely a decision in the English prize-courts at Westminster, on any general question of public right, that has not received the express approbation and sanction of our national court." (1) Lord Stowell's death has made an eulogy excusable, that

(1) Commentaries on American Law, I. 70.

might have seemed fulsome had he been still alive: as it is, it is not too much to say, that he has left behind him a name, with which is associated all that we most admire, and venerate, in the judicial character.

[Of late years a number of writers, both on the continent of Europe and in England and America, have published works more or less exhaustive and important on the subject of the Law of Nations. The works of Sir R. Phillimore, Dr. Woolsey, and Sir William Vernon Harcourt ("*Historicus*"), and other recent English treatises, are commented upon generally by the author in his Preface to the present edition. Besides these may be noted the striking work of M. Hautefeuille, entitled *Des Droits et des Devoirs des Nations Neutres en temps de Guerre Maritime*, published at Paris in 1848. The writer is acute, learned, and laborious. The rules he lays down are often deduced with skill and exactness from his principles. But the value of his whole work is seriously impaired, first, by his reckless habit of elevating abstract considerations into actually recognised principles; and, secondly, by an unbridled practice of denouncing the past international policy and action of England. Whatever strictures in respect of a selfish policy in the past England is fairly open to, it is to be borne in mind that an apparent severity of conduct and peremptoriness of claim must, in any case, have followed from her position as the only State concerned in logically developing those maritime claims of belligerents, which it has been the instinctive aim of every other State to curtail or ignore. The real imputation (if it be one) against England is, that maritime warfare now exists at all. Surely the country of M. Hautefeuille must bear some part of the corresponding imputation that land warfare still exists.

M. Ortolan's work, entitled *Règles Internationales et Diplomatie de la Mer*, is a book of great learning and authority. It has for its author a naval officer, and exhibits the practical use of the experience implied in such an authorship.

The work of Dr. Heffter, entitled *Das Europäische Völkerrecht der Gegenwart*, is, perhaps, the most authoritative of all recent treatises. It combines the merits of being arranged on a clear juridical principle of classification and of reposing at every step on copiously cited authorities. It has been translated into French, and is best known in England through this translation.

Dr. Bluntschli's *Das Moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*, may be considered side by side with Mr. David Dudley Field's *Outlines of an International Code*. Both works are of the highest possible interest as attempts on the part of thoroughly competent persons to throw into the precise terminology of written law all the propositions which compose the substance of the Law of Nations. Mr. Field is still more ambitious in his scheme, as he further essays to sketch out the rules by which the Law of Nations may fitly and logically be supplemented where it is deficient, and by which the conflict between the national laws of different States may be removed. With respect both to Dr. Bluntschli's and Mr. Field's works, it may be said that, as a type, an ideal, a standard, each work is invaluable. But it would be premature to encourage or indulge the hope that the bulk of the rules of the Law of Nations can at present be understood apart from the particular history of each one, or that they can be expressed without reference to the controversies and doubts with which all the more important of them are surrounded.

Other important works on the subject have recently appeared in most other countries of Europe, especially

in Italy, to which, for the present, it is not necessary to do more than allude.]

I have reserved for a separate notice a brief account of some of the principal collections of treaties, in order not to interrupt the above chronological series of the chief authorities on the Law of Nations. A few treaties were printed in the sixteenth century, as the concordat between the Emperor and the Pope of 1448, printed in 1513; the capitulation between France and the Porte, printed in 1570; and the treaty of 1569 between France and Savoy, printed in 1597. In our own country, Queen Elizabeth issued orders for the arrangement and publication of some of our state papers, but the first treaty published here was the treaty with Spain in 1604. This treaty was published by authority, as were several others in the reigns of Charles I. and Charles II. In the seventeenth century, the diplomatic intercourse which ensued on the wars of the Reformation occasioned a great demand for collections of state papers, the avidity with which they were sought being shewn by the fact, that three different editions of the peace of Westphalia were published before the treaties were signed. The *Theatrum Europæum*, and the *Mercurio* of Siri, contained treaties among other state papers, and there were also small collections of treaties published in France, Germany, Holland, and England. But the first great collection of treaties was that published by Leonard, who was printer to Louis XIV., and who received from that monarch a monopoly for twenty years for the publication of treaties. Leonard was assisted by the ministers of state, and by different ambassadors, and his work, published in 1693, was a valuable compilation of state papers; but his plan was confined to the publication of instruments relating to France, with very few excep-

Early collec-
tions of
treaties.

tions, and the most valuable parts of his work have been embodied in later collections. (1) The first great general collection of treatises was that of Leibnitz, entitled *Codex Juris Gentium Diplomaticus*, which has been already mentioned, and of which the publication was commenced in 1693, the same year that the work of Leonard appeared. Also in 1693 was issued a warrant to Thomas Rymer, to search and publish the British records existing in our various archives. The work of Rymer was undertaken on the plan, and at the instigation, of the Earl of Oxford; and the first volume of the *Fœdera* (as the work is usually called from the commencement of its long title) was published in 1704, and the fourteenth in 1713, in which year Rymer died. Sanderson, who had been assistant to Rymer, subsequently published the fifteenth and sixteenth volumes, which had been left by Rymer ready for the press, and he also issued a seventeenth, containing an excellent index, in 1717. These seventeen volumes compose the first edition of the *Fœdera*, and contain documents from A.D. 1101 to A.D. 1654. Various editions have been since published; that used in the following work is the edition published at the Hague in 1740; and a new edition was commenced in 1816 under the auspices of the Record Commission, who propose to continue the work of Rymer to the reign of George III. In 1710 appeared the first volume of Lunig's *Teutsches Reichs-Archiv*, a collection of state papers relating to the German empire, which was completed in 1722, in twenty-three volumes folio. This production has not, according to De Martens, the value of the works of Leonard and Rymer, the author not having had the

(1) The title of Leonard's work was "Recueil des traités de paix, de trêve, de neutralité, de confédération, d'alliance, et de com-

merce faits par les Rois de France avec tous les Princes et Potentats de l'Europe et autres depuis près de trois siècles," in 6 vols, 4to.

same advantage of free access to the public archives. Lunig afterwards published a *Codex Italiæ Diplomaticus*, in four volumes folio.

Thus, at the commencement of the last century, several of the chief European states had published records drawn from their public archives, and illustrating their own individual history, and that of other states so far as connected with them ; but with the exception of the *Codex* of Leibnitz, there was no work serving as a general book of reference to the diplomatic student. This want was supplied by the celebrated *Corps Diplomatique* of Jean Dumont, historiographer of the emperor. Of this admirable collection four folio volumes were published in 1726, under the superintendence of Dumont, who died in 1727. M. Rousset, who had also been an editor of a collection of public documents, conducted through the press four volumes which had been left in manuscript by Dumont, with the superscription, written on his death-bed :—" On trouvera cette seconde collection fort derangée, parceque j'étais actuellement occupé à l'enrichir, lorsqu'il plut à Dieu de m'envoyer la dernière maladie dont je vais mourir." These eight volumes folio compose the part of the *Corps Diplomatique* which was collected by Dumont. The work of Dumont commenced with state papers of the time of Charlemagne ; and in 1739 was published another folio volume, containing ancient treaties from the Amphyc-tionic agreements of unknown antiquity * to the time of Charlemagne, compiled with the greatest diligence and erudition by Barbeyrac. Rousset also published four volumes of supplement, and these thirteen volumes form the *Corps Diplomatique*. With this, however, are often sold two works, which have no connection with the *Corps Diplomatique*, though relating to diplomatic

Dumont's
*Corps Diplo-
matique.*

[* See Freeman's History of Federal Government, vol. i. ch. iii.]

subjects. Of these, one is a *History of Treaties of Peace*, by M. de Saint-Prest, and the other is a *History of the Peace of Westphalia*, making together six folio volumes. And about the same time as the *Corps Diplomatique*, were published Lamberty's *Mémoires du XVIII^{me} Siècle*, which obtained considerable reputation at the time, but which is now seldom referred to, the period it embraces being only from 1701 to 1731.

Its great
value.

The *Corps Diplomatique* is by far the best collection of state papers that has yet appeared: it is a work of enormous labour and research, and has superseded previous collections by embodying most of the valuable instruments which they contained. Nor is it probable that the work of Dumont will be superseded by a collection of greater value embracing the same period; partly from the little demand which exists for such collections at the present day; and partly because the race seems extinct of the old plodding students, those misers of learning, who toiled out a lifetime in burrowing among old manuscripts, and heaping together ponderous stores of knowledge, content with the pure satisfaction arising from the pursuits on which they were engaged. At the present day almost every thing is made for immediate use, and antiquarian collections of this description, if made at all, must probably be undertaken under the auspices of the government of a country. Some continental states have commenced such undertakings, and our own government is, by the instrumentality of the Record Commission, disclosing, for the benefit of future investigators of our history, the stores of our public archives. The labours of the commissioners are, however, hardly likely to benefit the student in diplomacy, being directed to so remote a period of our history that they interest the antiquarian rather than the politician; and although I understand that the commission is intended to embrace

the whole compass of our history down to a recent period, yet it is pretty clear that, at their present rate of procedure, that recent period will be antiquity long before the commission reaches it.* And national collections of state papers will inevitably be so voluminous, that to a student the perusal of many of them would be impracticable, and they would require some future Dumont to make their stores available by selection and condensation; and after the advantages which Dumont enjoyed of personal access to the imperial archives, and to the documents drawn from the French archives in the work of Leonard, and from the British archives in the work of Rymer, it seems probable that further stores would rather be curious, or corroborative, than affording new materials available for diplomatic purposes.

In Germany the works of Schmauss and of Wenck, published shortly after the *Corps Diplomatique*, gained considerable notoriety; but the smallness of their compass makes them very imperfect books of reference compared to the work of Dumont. In England several small collections of treaties were published in the early part of the last century, but none were of permanent value: the best English collection is that published by Chalmers, in two vols. 8vo. in 1790. This is a useful little collection, but it principally owes its circulation to the want of a better; the documents being but few in number, and by no means well-selected, many trivial papers being inserted at full length, while many important treaties are not given at all. Chalmers also published a work entitled *A Collection of Opinions of Eminent Lawyers*, on various subjects relating to commerce, reprisals, &c.; such a work, if well executed,

Other collections.

[* Since this was written a very different rate of progress has been made by the ably edited publications of the Record Office.]

would have been very useful, but it is so badly performed, from the want of judgment shewn in the selection, that it is of very slight value.

That of De
Martens.

The most complete collection of modern treaties is that of De Martens, commencing with those of 1761, and concluding with those of 1830. The first volume of this work was published in 1791, and it was continued at different periods, till the seventh, which comes down to 1803. This concludes the original *Recueil*. In succeeding years four volumes of supplement were published, of which the last is dated 1808. In these supplements a variety of instruments are given which had been omitted in the seven preceding volumes, and documents which had been omitted in the *Corps Diplomatique* of Dumont, and the *Codex* of Wenck, are also inserted, some of which are valuable, but most are of secondary importance. In the last volume there is a copious double index, in which the conventions in the whole eleven volumes are arranged, first in chronological order, and next under the heads of the different states whom they concern, and the index also contains references to the documents in the collections of Wenck and Koch. The work was then discontinued for nine years, during part of which time M. de Martens occupied an official station in the kingdom of Westphalia, and in that capacity concluded some treaties which are inserted in his subsequent collection. After the peace M. de Martens resumed his labours, and in 1817 and the three succeeding years, four additional volumes were published. Shortly afterwards M. de Martens died, and in 1824 an additional volume was published by his nephew, the Baron Charles de Martens, and in 1829, and the two following years, six more volumes appeared, published by the same bookseller, and edited by M. F. Saalfeld, bringing the work

down to 1831.* With the exception of some slight faults in the arrangement, this work is entitled to every praise. A chronological order is usually adopted; but acts relating to one negotiation are placed together, as for instance, the treaties and correspondence relating to the armed neutrality, and the acts relating to the congress of Laybach. Instruments of all descriptions are given, not only treaties, but dispatches relating to them, and other public documents of interest; and the language in which the documents were written is usually preserved. The research and assiduity brought to the task are very great, in short, they are German, and the work deserves the rank which I believe it generally holds, notwithstanding the work of Koch and Schoell, of being the best and most complete collection of modern documents that exists. In the first volume of the supplement, is given an interesting and valuable account of the different collections of treaties that had been published before that of De Martens; and a life of Dumont is also given, in which, with a fine freedom from all spirit of rivalry or detraction, De Martens does ample justice to that indefatigable compiler, to whom he has proved himself a worthy successor. (1)

[The most important British collection of treaties for practical use is Mr. Hertalet's "Twelve Volumes of British State-papers.

(1) When M. de Martens commenced his new series in 1817, he wished to make this work complete in itself, at the same time that it was a continuation of his former publication, and he therefore called the first volume of the new series the fifth volume of supplement, and also the first

volume of a *Nouveau Recueil*; this arrangement has been adopted by the successors of M. de Martens, introducing what is, I believe, unknown in English publications, namely, that two title pages are given to each of the eleven volumes of the new series.

[* The work has since been brought down first by Fred. Murhard from 1837 to 1854, then by Ch. Murhard and J. Pinhar to 1855, then by Ch. Samwer to the present time.—ED.]

Treaties and Conventions and Reciprocal Regulations at present subsisting between Great Britain and Foreign Powers, and of the Laws, Decrees, and Orders in Council concerning the same; so far as they relate to Commerce and Navigation, the Slave Trade, Post Office Communication, Copyright, and to the Privileges and Interests of the High Contracting Parties." The work was commenced in 1820 by Mr. Lewis Hertslet, librarian and keeper of the papers in the Foreign Office, and continued till within a few years of his death in 1870, the eleventh volume being published in 1864. The twelfth volume was published by his son and successor in his office, Mr. Edward Hertslet. The work is admirably indexed. The subjects are arranged in alphabetical order, a date placed against each document, and a reference given to volume and page. The index is printed on one side of the leaf only, so as to preserve a blank page on which to enter modifications as they occur.

Of late years both in France and in Germany some invaluable collections of current diplomatic documents have been made, and periodically published. To this class of works belongs *Das Staatsarchiv: Sammlung der officialen Actenstücke zu Geschichte der Gegenwart*. It was commenced in July, 1861, by Ludwig Karl Algedi and Alfred Klanhold, and is published at Hamburg. It has two indices, one according to subjects and the other according to countries, each index being alphabetical in some respects and chronological in others. The numbers come out twice a year.

A similar, or, indeed, scarcely distinguishable, work is the *Archives Diplomatiques: Recueil de Diplomatie et d'Histoire*, published by Amyot, Paris. The first number came out in January, 1861, and the numbers come out quarterly. The general mode of indexing is that of having one chronological and one alphabetical index, the several States being found under the latter index.

Another similar work of equal value to the above is the periodical issue of the *Staatsarchiv*, by the editors of, and in connection with, the *Revue de Droit International* (Gand).

Besides the above class of complete documents, a great progress has been made of late years in the publication of copious indices to collections of treaties, a task, the utility of which cannot be put too high.

Such a work is the *Répertoire des Traités de Paix, de Commerce, d'Alliance etc., Conventions et autres Actes conclus entres toutes les Puissances du Globe, principalement depuis la Paix de Westphalie jusqu'à nos jours*, by M. Tétot, Archiviste to the Minister of Foreign Affairs (Paris). In one volume the arrangement is alphabetical and in the other chronological.

An useful selection of treaties for students is Ghillany's *Recueil des Traités de Paix les plus importants, des Actes de Congrès et autres documents relative à la Politique internationale depuis le Traité de Westphalie jusqu'à ces derniers temps*. The treaties are translated into French, when already not in that language, and there is an introduction by J. H. Schnitzler. The work is published at Nordlingen, and consists of a single compact volume.

Another valuable and copious work of reference of the same species is the *Recueil manuel et pratique de Traités, Conventions et autres Actes diplomatiques sur lesquels sont établis les Relations et les Rapports existant aujourd'hui entre les divers Etats souverains du Globe depuis l'Année 1760 jusqu'à l'Epoque actuelle, par le Baron Charles De Martens et le Baron Ferdinand De Cressy*. This work is published at Leipzig, and is in several volumes, which are being gradually brought down to the present time.]

I recommend the works of Dumont, and of De Martens, to the student who wishes to obtain a thorough

The Abbé
Mably.

insight into the conventional part of the Law of Nations; but those who have not time to pursue so complete an investigation, will find the work of Chalmers useful; and there is an excellent summary, entitled, *Le Droit Public de l'Europe*, by the Abbé Mably. But at the same time that I praise his production as a summary, I have no part in the principles, or whatever else they may be, which are advanced by Mably, who is just what is expected from a political abbé before the Revolution, witty, crafty, intriguing, and unscrupulous. The following are samples of what I mean:—"Ma morale est si peu austère, que je ne demande pas pour lecteurs d'honnêtes gens, mais simplement des ambitieux qui fassent quelque usage de leur raison." (1) "Les puissances dominantes doivent en quelque sorte veiller à ce qu'aucune nation ne se corrige de ses vices." (2) Speaking of a prince of the third class, he says, "Pendant la paix il négocie, et quand ses demandes sont fondées sur un droit évident, on a quelque honte de ne lui pas accorder une partie de ce que lui appartient." (3) Mably, however, insists on the policy of having a good character,—from the use that may be made of it; and thinking it necessary to say something in favour of virtue, he praises it, in the ancient Romans. His work is, nevertheless, a useful compendium of diplomatic history for the period which it embraces.

Omitted and
Kamptz.

With this I conclude my notice of previous works connected with the Law of Nations, in which I have endeavoured to avoid being incomplete from too scanty an account, at the same time that I have wished to avoid a tedious minuteness. I believe that I have not omitted the mention of any of the great jurists whose opinions are referred to as authorities on the science under consideration, and of whom Chancellor Kent remarks, that "no civilized nation, that does not arrogantly set all

(1) I. 32.

(2) *Id.* 62.

(3) Ch. VIII.

ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on International Law." (1) I might easily have made my catalogue much longer, and many other works will be mentioned in the sequel, when discussing topics to which they refer. For a more detailed account of writers on the Law of Nations, I would recommend the work of Ompteda, entitled *Litteratur des Völker-Rechts*, (2) to which a volume in continuation was added by Kamptz in 1817. These works contain catalogues, arranged in several different ways, of works on the Law of Nations, and I found in them mention of English works which I had never heard of in our own country. (3) It is a curious contrast that is presented by these three volumes of critical catalogues of foreign works, on a science on which we have not a single systematic treatise by an English writer.

(1) Commentaries on American Law (Abdy), p. 43.

(2) 2 vols. 8vo, 1785.

(3) The English is, however, so very badly spelt as to make it desirable that the authors should have begun their knowledge of

our literature, as M. Jourdain proposed to commence his course of philosophy, "apprenez moi l'orthographe," but it may not have been the fault of the authors, and "hanc veniam damus petimusque vicissim."

BOOK II.

OF THE SOURCES OF THE LAW OF NATIONS.*



CHAPTER I.

OF THE LAW OF NATURE.†

Divisions of
the subject.

THE obligations on which international law is based, have been variously classified by different writers. By some they have been divided into the "necessary" and the "voluntary;" by others, into the "absolute" and the "arbitrary;" by others again, into the "primary" and the "secondary," and this "secondary" has been subdivided into the "customary" and the "conventional." Besides these, and other similar divisions, there is the classification which will here be employed, of the "natural" and the "positive" Law of Nations. All these divisions are founded on the same principle, of considering separately the national obligations which result from the divine law, and those which are of human institution, whether resulting from direct treaty, or arising from the tacit consent of nations.

[* The word "source" (German *Quelle*) as applied to law has, at the least, two distinct meanings, which, however, are closely connected. One is that of the quarter to which recourse must be had in order to know what a rule of law is. The other is the immediate fact or group of facts which originally called a rule of law into existence. It is a peculiarity of the Law of Nations that, in reference to it, the two meanings are scarcely distinguishable.—ED.]

[† For remarks on this expression, see note at the end of the chapter.—ED.]

As men, before they become members of civil society, are in a state of nature, so independent nations, acknowledging no common superior, are in a state of nature with regard to each other. "But, though this be a state of liberty, yet it is not a state of license. * * * * *

The law of nature.

The state of nature has a law of nature to govern it." (1) In the words of Hooker, "Law rational, which men commonly call the law of nature, meaning thereby the law which human nature knoweth itself in reason universally bound unto, which also for that cause may be termed most fitly the law of reason; this law, I say, comprehendeth all those things which men, by the light of their natural understanding, evidently know, or at leastwise may know, to be befitting or unfitting, virtuous or vicious, good or evil for them to do." (2) "Itaque," says Heineccius, "*jus naturale* est complexio legum, ab ipso Deo immortali generi humano per rectam rationem promulgatarum. Si vero illud tanquam scientiam considerare malis, jurisprudentia illa naturalis erit habitus practicus voluntatem supremi legislatoris ex rectâ ratione cognoscendi, adplicandique quibusvis speciebus obvenientibus. Quæ, quia in jure, a Deo immortali profecto, enarrando adplicandoque versatur, recte etiam *jurisprudentia Divina* dici potest." (3)

The law of nature, by the obligations of which states are bound, being identical with the will of God, it is necessary to ascertain that will, which is done either by consulting direct revelation, where that is declaratory, or by the application of human reason where revelation is silent.

Law of nature identical with the will of God.

Every thing around us proves that God designed the happiness of his creatures. It is the will of God that

(1) Locke on Civil Government, book II. ch. II. s. 6.

p. 83, ed. 1676.

(3) *Elementa juris Naturæ et Gentium*, lib. I. c. I. s. 12.

mankind should be happy. To ascertain the will of God regarding any action, we have therefore to consider the tendency of that action to promote or diminish human happiness. The right application of this principle, commonly known as the principle of utility, is identical with the law of nature, the laws prescribed by human nature being obviously the laws tending to human happiness.

The principle
not new, but
its application
new.

The principle of utility is not a new one ; it has been called "as old as philosophy ;" it is only the application of this principle that is new. Vattel was directed by some vague sense of utility, when he said, that "the first general law that we discover in the very object of the society of nations, is, that each individual nation is bound to contribute every thing in her power to the happiness and perfection of all the others." (1) And Montesquieu, in his valuable attempt to teach politics by induction, directly states the principle of utility. "The law of nations is naturally founded on this principle, that different nations ought in times of peace to do one another all the good they can, and in time of war as little injury as possible, without prejudicing their real interests." (2) But although this principle was known, and may indeed be said to be self-evident, yet its application in moral discussions is of comparatively recent introduction. The bringing this principle into general circulation is due to the writings of Bentham, and constitutes his real claim to be regarded as an improver of the science of morals. Bentham's classifications may be regarded as unnecessary, and his works may, and probably will, fall into disuse ; but the benefit he conferred on moral science should never be forgotten. He was the propagator of a doctrine of which he expressly disclaims being the originator ; but it is

(1) Prel. s. 13.

(2) *Esprit des Lois*, liv. I. ch. 3.

to him that we owe the common use of the most correct, and readiest, test of moral action. I am no great admirer of Mr. Bentham's writings. When a student first becomes acquainted with them, their perusal will generally be a most irksome task; their method may even seem ludicrous, and their production at all, useless. I do not even think that Mr. Bentham always had a correct notion of the right application of his own theory, but, in his own quaint expression, "new instruments are seldom handled at first with perfect ease." It is in going back to the writings of the elder moralists that we perceive, in the full force of contrast, the value of the principle now in common use in moral discussions. Let the student observe how little was effected by the huge erudition of Suarez or of Selden; let him see how the union of the greatest learning and the highest motives failed to rescue Grotius from false conclusions; let him feel how cumbersome is the machinery of Pufendorf; and how even the advanced philosophy of Heineccius languishes under a defective method; and let him compare with these the application of the doctrine of utility, as enunciated by Paley, or in the recent work of Mr. Austin, and he will understand what obligation was conferred by Bentham in the introduction of utility as the habitual test of moral action. Had this principle been understood by Wolf, he would never have deemed it allowable in war to have recourse to the useless cruelty of poisoned weapons; nor could Grotius, had he been conversant with this principle, have admitted the right of slaughtering women and children. Both writers would have seen that war is an evil, recourse to which can only be justified by the avoidance of greater evils; that the infliction of no greater evil was justifiable than was imperatively called for by the circumstances of the case; and that any unnecessary cruelty whatever was a direct violation of the law of nature.

The principle
of utility im-
properly called
dangerous.

The principle of utility has often been called dangerous. This is not true with regard to the principle itself, but it is thus far true, that the misapplication of the principle is dangerous, and that the principle is rather liable to be misapplied. The besetting fallacy in arguments grounded on utility, is the error of mistaking the value of the rule as compared with the value of the exception. Paley has ably exposed this fallacy, and has insisted on the importance of general rules in the province of private morality. In treating of the morality of nations, some writers have been betrayed into the fallacy I mention. As an example of what is meant, may be cited the argument of Mr. Godwin, concerning "Promises," in his *Political Justice*. Mr. Godwin says, that what is promised is either right, wrong, or indifferent; if right, the promise ought to be kept; "not because I promised, but because justice prescribes it." * * * * "A promise can make no alteration in the case. I ought to be guided by the intrinsic merit of the object, and not by any external or foreign consideration." (1) Now, this application of the doctrine of utility is incorrect, for this reason, that such a construction would destroy all confidence in human intercourse, the magnitude of which evil far outweighs the comparatively trivial importance of the individual inconvenience, sustainable from the general rule under which utility commands veracity. A similar fallacy, regarding the observance of treaties, has been committed by Pinheiro-Ferreira, in his note on De Martens, concerning the conventional law of nations. (2) According to his argument, treaties are not binding whenever they are not beneficial to one of the contracting powers; a position that would destroy the use of such engagements altogether, as what is thought mutually beneficial at any individual moment would be

(1) *Political Justice*, I. p. 151,
ed. 1793.

(2) De Martens, *Précis du
droit des Gens*, note 10, I. 370.

pursued without such instruments; and if an attempt is made to avoid a trifling inconvenience by violating a solemn engagement, the greater evil is produced of rendering unsettled the relations of all states, by shaking the reliance now placed on public faith. No doubt there are extreme cases, both in the casuistry of individuals and of nations, that justify a departure from the general rule; but the importance of the general rule is such, that any departures from it should be admitted with the greatest reluctance. In cases where the importance of the exception justifies a departure from the rule, the application of the principle of utility admits rather more laxity with regard to the morality of nations, than with regard to the morality of individuals. Hume gives it as his opinion regarding nations, that "the observance of justice, though useful among them, is not guarded by so strong a necessity as among individuals, and the moral obligation holds proportion with the usefulness. All politicians will allow, and most philosophers, that reasons of state may, in particular emergencies, dispense with the rules of justice, and invalidate any treaty or alliance, when the strict observance would be prejudicial in a considerable degree to either of the contracting parties. But nothing less than the extremest necessity, 'tis confessed, can justify individuals in a breach of promise, or an invasion of the properties of others." (1)

Paley's remarks on this question are so exactly in point as to excuse their quotation at length:—"in applying the principles of morality to the affairs of nations, the difficulty which meets us arises from hence — 'that the particular consequence sometimes appears to exceed the value of the general rule.' In this circumstance is founded the only distinction that exists between the case of independent states, and of indepen-

Opinion of
Paley.

(1) Hume's Inquiry concerning the Principles of Morals, Essays, II. 274.

dent individuals. In the transactions of private persons, no advantage that results from the breach of a general law of justice can compensate to the public for the violation of the law; in the concerns of empire, this may sometimes be doubted. Thus, that the faith of promises ought to be maintained, as far as is lawful, and as far as was intended by the parties, whatever inconvenience either of them may suffer by his fidelity in the intercourse of private life, is seldom disputed; because it is evident, to almost every man who reflects upon the subject, that the common happiness gains more by the preservation of the rule than it could do by the removal of the inconveniency. But when the adherence to a public treaty would enslave a whole people; would block up seas, rivers, or harbours; depopulate cities; condemn fertile regions to eternal desolation; cut off a country from its sources of provision, or deprive it of those commercial advantages to which its climate, produce, or situation naturally entitle it, the magnitude of the particular evil induces us to call in question the obligation of the general rule. Moral philosophy furnishes no precise solution to these doubts: she cannot pronounce that any rule of morality is so rigid as to bend to no exceptions; nor, on the other hand, can she comprise these exceptions within any previous description. She confesses that the obligation of every law depends upon its ultimate utility; that this utility having a finite and determinate value, situations may be feigned, and consequently may possibly arise, in which the general tendency is outweighed by the enormity of the particular mischief; but she recalls, at the same time, to the consideration of the inquirer, the almost inestimable importance, as of other general rules of relative justice, so especially of national and personal fidelity; the unseen, if not unbounded extent of the mischief which must follow from the want of it; the danger of leaving it to the sufferer to decide upon the comparison of particular and general consequences, and

the still greater danger of such decisions being drawn into precedents. If treaties, for instance, be no longer binding than whilst they are convenient, or until the inconveniency ascend to a certain point, which point must be fixed by the judgment, or rather by the feelings of the complaining party, or if such an opinion, after being authorized by a few examples, come at length to prevail, one, and almost the only method of averting or closing the calamities of war, of either preventing or putting a stop to the destruction of mankind, is lost to the world for ever.” (1)

In the above quotations from Hume and from Paley, one particular example, the faithful observance of treaties, is alluded to by both, and was apparently the single case from which they both generalised when treating of the application of the doctrine of utility in the affairs of nations. But the faith due to treaties is a little removed from the operation of such arguments, by two reasons. A promise made by a delegate, is only binding on the principal, as far as the latter has given powers to the delegate to make engagements for him. Now, it can never be supposed that a nation can have delegated to an individual, powers to compromise that nation's vital prosperity, independence, or permanent happiness. In the extreme cases, therefore, mentioned by Paley, it might be justly said that the treaty was not binding, because no delegate possessed powers to conclude such a treaty. And, for the second reason, this understanding actually exists among the powers of Europe. A promise is binding on the promiser, in the sense in which he intends the promisee to understand it.* Now, in treaties, a promisee among the

This opinion considered.

(1) Paley's Moral Philosophy, Book VI. ch. XII.

[* See Mr. Austin's criticisms of Paley's doctrine in his 21st Lecture.—ED.]

Christian powers, would receive the stipulations promised by a treaty, with the tacit understanding that if such an engagement included in its fulfilment any very enormous sacrifice of the promising nation's happiness, the engagements in the treaty would not be complied with. Thus, if two nations entered into a treaty of mutual succour, supposing one of these nations were subjected to an invasion, to repel which demanded all its resources, this state would not be expected, by the other contracting party, to detach forces whose absence might compromise its independence. But in the morality of nations, as in that of individuals, these extreme cases are of rare occurrence ; the value of the principle, as compared with the consequence of the exception, should always be kept in view, and nothing short of the extremest urgency can justify a dereliction of the great principles of national morality.

Importance of
revelation in
confirming the
law of nature.

Mr. Ward, in his *Inquiry into the Foundation and History of the Law of Nations*, after noticing how the practice of various nations had differed, and how indistinct had been the notions of philosophers as to what was incumbent on states in their external relations, argues, that Christianity affords us the best standard of right, and the best index to the duties of nations. I quite agree with him as to the importance of revelation in moral discussions, but Mr. Ward has not developed his views, and has not stated in what manner revelation should be applied. Now, if the words of Scripture were taken in their literal sense, ordering a quaker-like abstaining from all measures of violence, the scheme of Christianity would, with regard to nations, be open to the old objection of Machiavelli, that, by making it virtue to bear injuries and not to resist by force, it gave the wicked a great advantage over the good in human affairs. But it is not from any positive declarations that Christianity will amelio-

rate the intercourse of states; Christianity reveals to us a general system of morality; the application to the details of practice is left to be discovered by human reason. It is as an "authoritative publication of natural religion" that Christianity must be looked to in international relations. This is well stated by Butler, in his *Analogy*: "Christianity is a *republication of natural religion*: it instructs mankind in the moral system of the world; that it is the work of an infinitely perfect Being, and under his government; that virtue is his law, and that he will finally judge mankind in righteousness, and render to all according to their works in a future state. And, which is very material, it teaches natural religion in its genuine simplicity, free from those superstitions with which it was totally corrupted, and under which it was in a manner lost. Revelation is further an authoritative publication of natural religion, and so affords the evidence of testimony for the truth of it." (1)

It is to the conjoint advance of religion and morality, that we must look for the improvement of the relations between independent states. Philip de Comines quaintly remarks, "there is not one, or at least very few princes, who, having any town or province, that belongs to their neighbours, in their possession, will restore it upon consideration of God's justice or the torments of hell." (2) There is too much reason to fear that this may still be the case. But it is, nevertheless, from the sanction which revelation gives to natural law that we must expect the gradual increase of the respect paid to justice between nations: and I cordially adopt the noble words of Washington in his farewell address: "Let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be con-

The joint influence of religion and morality required among nations.

(1) Butler's *Analogy*, part II.
ch. I.

(2) *Memoirs*, I. 351, 352.

ceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." (1)*

(1) Marshall's *Life of Washington*, II. ch. XI. p. 404.

[* The conception of a "Law of Nature" and the doctrine of "Utility" alluded to in the present chapter, have been each subjected to very rigorous criticism since the appearance of the first edition of this work. The actual history of the expression "Law of Nature," as traced by Sir H. S. Maine, has been alluded to in a previous note (see p. 10). The latent idea which has given such a potency to the expression, is, no doubt, contained in a widely-diffused sentiment or belief to the effect that there exists somewhere an absolute code of moral rights and duties, however hard it may be to discover it, and however lengthy and tortuous may be the progress of any particular nation towards a general and public recognition of it. According to Aristotle's language, *ὅταν γὰρ ἑκαστὸν ἔσται τῆς γενέσεως τελεσθείσης, ταύτην φαμὲν τὴν φύσιν εἶναι ἑκάστου*, "what every being is in its complete development, that is its nature" (Pol. I. 2). Nevertheless, though the conception of the existence of some absolute and ideal standard or canon of right has served most beneficent purposes as a stimulus to moral aspirations, and has contributed greatly towards the progressive formation of rules of right conduct between States, yet the term *Nature* is of itself so vague and indefinite that a violent reaction against the whole class of conceptions, with which the use of that term was implicated, was only what might have been looked for. Such a reaction exhibited itself in the Utilitarian theory of morality and in the critical philosophy of Bentham and his disciples, by whom the

[theory was mainly formulated and propagated. In the hands of Bentham and the two Mills, Utility (of a very rarefied and sublimated form indeed in the hands of Mr. J. S. Mill) was proclaimed to be not only the supreme test, but also the sole motive, of all right action whether on part of individual persons or of States. It would seem that Mr. Austin considered the principle of Utility valuable solely as supplying a test of the rightness of actions, while he looked elsewhere for the motive. Sir H. S. Maine, in his recent work on "*Early Institutions*" (Lecture XIII.), has endeavoured, with some success, to explain why Bentham attached such superlative value to the Utilitarian method. He says it was owing to Bentham's treating the formula of the "greatest happiness of the greatest number" as a "working rule of legislation," and as such alone originally conceived by himself. "Bentham" (says Sir H. S. Maine) "was in truth neither a jurist nor a moralist, in the proper sense of the word. He theorises not on law, but on legislation; when carefully examined, he may be seen to be a legislator, even in morals. * * * * This transfer of his working rule from legislation to morality seems to me the true ground of the criticisms to which Bentham is justly open as an analyst of moral facts." See also Mr. Henry Sedgwick's handling of the general topic in his recent important treatise on the "*Method of Ethics*."—ED.]

CHAPTER II.

OF THE CUSTOMARY LAW OF NATIONS.

*Positive law
of nations.*

BESIDES the obligations by which states are bound by the *law of nature*—obligations from which none can be exempt, and which are inseparable from their existence as communities of responsible agents—there are also national obligations arising from custom and convention. These latter obligations differ from the former, inasmuch as they originated, not in Divine law, but in human compact, either tacit or expressed. But, once existing and acknowledged as law, the obligation to conform to this *positive law of nations* is as indispensable as obedience to the law of nature. The Divine law commands the observance of the Positive law; and the latter cannot be disregarded without violating the former.

*Necessity for
this law.*

Besides the great and obvious duties which the nature of mankind commands, there are a vast number of cases in which the interests of different states are concerned, which cannot be settled by any immediate deduction from the principles of justice, but in which it is indispensably necessary that some certain rule should obtain, to prevent the endless strife which must ensue if no common rule were acknowledged. Thus Utility, which might not have been able to dictate whether one course or another had better have been pursued originally, is nevertheless absolute in its demand of obedience to these Positive laws, when once instituted.

*Probability of
its being co-
incident with
utility.*

The existence of these laws, and the fact of their actual acknowledgment by the powers of Europe, affords an *à priori* probability that they are really based

on utility, having general convenience as the cause of their becoming current as rules of intercourse. Grotius goes so far as to apply the term *Jus Gentium* exclusively to the rules gathered from consent and practice, classing the deductions of reason under the term *Jus Naturale*. He employed, he tells us, "the testimony of philosophers, historians, poets, and orators; not because an ill-judged faith should be accorded to their assertions, which often are subservient to their sect, their argument, or their cause; but because *that* ought to be referred to some principle, which has been acknowledged as true by many persons at different times and places. This, in the subjects of our discussions, must be either a right deduction from the principles of nature, or some general consent; the former teaches us the law of nature, the latter, the law of nations." (*Illa jus naturæ indicat, hic jus gentium*). (1) This law of nations, Grotius afterwards adds, is proved in the same manner as the unwritten civil law, by constant usage, and by the opinion of authorities (*usu continuo, et testimonio peritorum*). (2) We have seen that Pufendorf denied the obligation of this customary law, and asserted that the law of nature was the only law really indispensable for the observance of states. (3) An opinion nearer to the truth than Pufendorf's is found in a work which will be afterwards examined in detail, Hübner's Treatise *De la saisie des bâtimens neutres*.* Speaking of the laws resulting from usage, he says, "si l'on trouve ces derniers contraires à l'équité naturelle, ils ne peuvent jamais devenir obligatoires: s'ils sont indifférens à son égard, ils n'obligent que très imparfaitement: si, au contraire, ils lui sont conformes, ces usages deviennent sans contredit obligatoires; non

(1) De Jure Prol. 40.

(3) *Ante*, p. 32.(2) *Id.* lib. I. cap. i. § 14.

[* See p. 236.]

pas en tant que ce sont des usages, mais en vertu du code universel des nations qui les érige en devoirs." (1) This is not quite correct in its second clause; because, in indifferent matters, the observance of a settled rule is of such consequence as to make it a direct duty to conform to the usage of nations. But, with regard to the first proposition, it is clear that usages which violate the law of nature can never be obligatory upon mankind.

Customary law
should be
tested by the
law of nature.

It was by deriving the law of nations entirely from the usage of nations, that Grotius was misled into the defence of practices which natural or divine law can never sanction. A *reductio ad absurdum* of this principle might be made by supposing it applied to savage tribes, and the law of nations, deduced from their practices in war, would sanction the torturing or devouring of captives. Living at a period when civilization was so little advanced that history was principally a record of barbarism, the precedents from which Grotius deduced his rules, were sometimes mere examples of ferocity. The condition of war, especially among the nations of antiquity and in the middle ages, was in great want of the check of the restraint imposed by the law of nature. The state of war is in itself a condition in which the violent passions of men are aggravated to the utmost, at the same time that there is most scope given for the outbursts of such tendencies; and among the men who choose the profession of the soldier, there has always existed, and formerly more than at a later period, a greater proportion to whom violence is welcome, or ferocity habitual, than among any other class. Precedents drawn from the practice of such men, acting under such circumstances, would naturally be expected to allow much cruelty; and it is in not testing, by the

(1) De la saisie, &c. avant-propos, § 7.

law of nature, usages which may have arisen either from such peculiar circumstances of the agents, or from the peculiar state of society at the period, that Grotius is occasionally betrayed into false conclusions. But these cases are the exception, both in the work of Grotius and in the application of his principle. As a general rule, it may be reasonably assumed, that what has been generally practised by nations, and what has been generally prescribed by jurists, has its foundation in some principle of expediency or convenience; and that thus utility, which now demands the observance of usages, was also consulted in their first establishment.

Inasmuch as civilization is constantly advancing, and has been in continual progress ever since the law of nations was first considered as a science, the making what *shall be* the practice of states dependent upon what *has been* the practice of states, seems in some measure liable to the objection of obliging a more civilized state of society to conform to the usages of a less civilized period. This objection is partly met by the incalculable benefit which results from having some settled rule, even although that rule may not always appear the best that could possibly be devised. But it may also be observed, that though the usages of a more imperfect state of society do partly control the intercourse of a later day, yet that civilization, as it has advanced, has frequently modified the customs of preceding times, and, while adhering to the principles of foregoing usages, has gently altered their application. For instance, in the immunities of ambassadors the customary law had introduced a variety of privileges requisite to the right discharge of the functions of those high officers; but, as we shall find when treating of this subject, privileges founded on reason were formerly pushed to absurdity: besides the minor grievances of the exemption from custom-house dues being made the

Objection to customary law derived from the advance of civilization.

regular means of smuggling, and the freedom from arrest being used as a protection from the consequences of dishonesty towards tradesmen, the independence of the local authorities allowed to the houses of ambassadors made their mansions occasionally places of refuge for criminals, who were thus effectually screened from the officers of justice; and, in the case of the *franchises* at Rome, the ambassador of France made a considerable space round his mansion into a sort of sanctuary, (if that name may be allowed to a den for thieves,) where the municipal authorities had no power of pursuing criminals. Thus an immunity, useful in itself, came, by a perverted exercise, to be a public nuisance. This was carried with a high hand formerly, but the obvious absurdity of such a custom has caused a different application of the principle of the "*ex-territoriality*" of ambassadors: all immunities required by their position are still allowed to ambassadors; but the smallest state in Europe would now refuse to admit the abuses of this privilege which Louis XIV. forced upon the submission of the Pope. Thus has the advance of civilization improved the construction of the customary law: other instances will be remarked as we proceed; this being merely the place for meeting the objection of making a later age subservient to the habits of a previous age. Where error has been detected as society has advanced, the customary law has been gently modified; it has been modified by the same power to which it owed its existence, and by which alone it can be modified—the expressed or tacit consent of nations; and by this it may still further be altered, when improvements shall be suggested by the greater progress of human society.

Anomalies in
the positive
law of nations.

Still there are, no doubt, anomalies in the positive law of nations,—an imperfection which that law shares in common with all unwritten law; where a slight

divergence in the original construction leads to great difference in subsequent results. One of the most remarkable instances of this, in the positive law of nations, will be found in the wholly different usages existing in maritime warfare, and in wars carried on by land. In maritime warfare, private property becomes the property of the captor; in wars by land, the property of private persons is usually respected. In wars by land, subjects of neutral governments may accept commissions from belligerents, and be treated like other enemies;—in maritime warfare, a neutral who accepts a commission from a belligerent, is, by many nations, regarded as a pirate.* The granting letters of reprisal may also be remarked, wherein sovereigns, whose subjects have unredressed grievances from the subjects of a state with which they are in amity, grant commissions to take forcible possession of cargoes and ships of the offending nation found at sea, and thus to indemnify themselves; while such commissions to seize property on land are never granted. These, and similar differences, partly result from the different nature of hostilities by sea and by land, and partly are the result of settled usages, of which the first establishment is sometimes lost in obscurity, and which may possibly have had their origin in accidental or arbitrary circumstances; but which, by the habitual concurrent practice of states, have now become an acknowledged part of the European law of nations. Divergences of law are imperfections inseparable from human jurisprudence: not only does one national code differ from another, but there is no national code that is free from anomalies: the law of nations cannot claim an exemption from such inconsistencies; but it has, perhaps, fewer objections

[* See p. 111. See, also, the cases, opinions and treaties relative to this subject collected in Phillimore's Commentaries, vol. I. p. 426 (second edition).—ED.]

of this description than the judicial system of any single nation.

The customary law a good system as a whole.

Indeed the customary law of nations, though chargeable with some anomalies, is, as a whole, an admirable system for regulating the intercourse of States. Although the practice of the darker ages has bequeathed to us some objectionable usages, yet, upon considering what the times were when these usages originated, it will appear wonderful that there is not more of barbarism in these legal relics. Some of the written instruments of the middle ages, relating to the intercourse of States, have stood the test of being still acknowledged as most consistent with the principles of justice, after modern attempts at innovation; and some usages which we owe to that period shew traces of that Roman code which appears never to have been wholly lost, and of the spirit of that religion which priestcraft never wholly obscured. But the customary law of nations is not wholly, or even principally, dependent on the usages of the darker ages. The great body of its regulations are of more recent institution, and have sprung up while law, and civilization, and religion, have all been advancing together. It has partaken of the influence of their refinement, and has been created as the wants of states have given occasion to its establishment. Arising, as it has done, to satisfy those wants, the customary law has a better origin than regulations derived from abstract principles. It is partly constructed out of the practices of a barbarous period, but it was principally affected by the nearer intercourse of states which dates from the wars of the Reformation, a period so remarkable for the action of great minds in great circumstances, and when the usages of nations were controlled by jurists and statesmen whom the world has rarely seen equalled. The advance of civilization has enabled us, in some things, to modify their

decisions; but the science which we are considering is under the greatest obligation to their penetration and judgment. It is chiefly owing to their influence that the customary law of nations, like our own common law, though liable to the objection of some anomalies, is yet, when regarded as a whole, an admirable judicial system.

[Though the customary usages of States in their mutual intercourse must always be held to afford evidence of implied assent, and to continue to be a main basis of the structure of the Law of Nations, yet there are several circumstances in modern society which seem to indicate that the region of the influence will become increasingly restricted as compared with that of the influence of well-ascertained ethical principles and formal convention. Among these circumstances must be reckoned the larger knowledge that is being daily obtained of political communities which exhibit the most bizarre varieties of conduct in their ordinary intercourse with each other, and yet which persistently assert their claim to share in the advantages of the European Law of Nations. The critical analysis and historical research by which the phenomena of custom have been of late so strictly scrutinised and illustrated must also tend to dethrone custom from its seat as an arbitrary source of binding law.]

CHAPTER III.

OF THE CONVENTIONAL LAW OF NATIONS.

Conventional
part of the
positive law of
nations.

THE *positive* law of nations, as has been already mentioned, is dependent on *custom* and on *convention*. Treaties, being merely contracts between states, obviously cannot oblige, by their provisions, states which are not parties to such contracts. Nor can any number of treaties, stipulating a particular course of action, although existing for any length of time, oblige, *as treaties*, any but the contracting parties. But treaties continually engaging the same course of action, or rather articles of the same import continually inserted in treaties, are with reason cited as *evidence* of the *customary* law of nations. When, for instance, we find that, excepting only one or two instances, in all treaties among all European nations where the right of searching merchantmen is mentioned, it is provided that the commissioned cruiser is to send a boat for this purpose with not more than three or four men besides the rowers, herself remaining at the distance of cannon range,—it is allowable to cite these treaties as indicating the general consent and constant usage of nations with regard to this practice. But it can never be admitted, that any balance should be struck between the number of treaties on one side of any practice and on the other, as has been attempted by some writers. Where a variety of treaties exist, stipulating contradictory provisions, all that can be proved from them is, not that a certain course is *customary* from the balance of the number of treaties on one side, but that such contradiction shews that there is no settled usage, or that if there

were a settled usage it has been the subject of frequent exception. From incidental circumstances it is often manifest whether treaties are merely declaratory of an established usage, or whether they are stipulating for unusual privileges. As far as number goes, perhaps, there have not been so many treaties on any single subject, in recent times, as on that of *extradition*, or delivering up criminals who have fled from the country under whose jurisdiction the crime was committed, to the territory of another state, whose tribunals, from one cause or another, will take no cognizance of the offence. But these treaties, so far from proving any usage of extradition, prove quite the reverse; making it clear, from their constant recurrence, that the purposes of municipal justice require a practice which cannot be claimed unless under express stipulation. The same thing is evident from the vast number of treaties which regard the *droit d'aubaine*, and which, in stipulating for an exemption from this obnoxious practice, shew, numerous as they are, that they are merely a long series of exceptions to a usage which was always in force when not the subject of special contract. Observations will be found in another place on the construction of treaties, and also on their duration, and other circumstances affecting them: treaties are only mentioned in the present instance as the *conventional* part of the *positive* law of nations, and are noticed because of their effect upon the law of nations as an entire system.*

[* See p. 122.]

CHAPTER IV.

OF THE LAW OF NATIONS AS DERIVED FROM THE
PRECEDING SOURCES.

Law of nations
as a whole
system.

THE law of nations, being thus dependent on the law of nature, on custom, and on convention, bears some resemblance to the divisions of our own law, as comprised under the heads of equity, common law and statute law. It cannot boast the exactness of our municipal code, which, notwithstanding its proverbial uncertainty, is, owing to the number of cases decided, better ascertained than, considering the comparatively rare discussion of questions regarding the law of nations, is in the latter case possible. Nor has it the advantage of a fixed tribunal to decide in doubtful cases; neither has it the advantage of the "sanction" which the authority of the sovereign gives to municipal law. Nor can it be denied that history records numerous instances, even in modern times, of law being disregarded, and of clear rights being flagrantly violated. But notwithstanding its deficiencies, and its occasional neglect, the law of nations, as derived from natural law, from custom, and from convention, is, *as a fact*, acknowledged as binding by the States of Europe and of North America.* When differences occur between nations, reason

[* The exact extent at the present moment of the operation of the Law of Nations is a matter of some difficulty to settle. In their intercourse with distant and weak States there has been too much disposition among the States of Europe to avail themselves of that law when it has been in their favour, and to repudiate its obligations when it would have been against them. Thus the independence of China as a sovereign State has been persistently encroached upon by England, while the duties of the Chinese government, in respect of the protection of

is brought to bear to discover the right of the case, and the standard writers are appealed to, and usage is shewn from historical accounts of the previous practice of states; and the rule of conduct, as deduced from these sources, is acknowledged as the law of nations. The occasional infringement of this law is no argument against the fact of its existence and acknowledgment: it is a contingency to which it is liable from its very nature, being a rule to be observed by those who have no common superior to enforce its constant observance. As a fact, the law of nations is constantly appealed to; and has been usually obeyed: it has been recognised as a body of law for the guidance of nations in a great variety of state papers; it has been acknowledged as binding by an express act of the legislature of the United States; and is referred to as a known system in a treaty of the Turks. It has even been recognised at the very moment of its violation; and the sovereigns who have broken through its restraints have invariably acknowledged its existence, by the manner in which they have attempted to make their violence appear consistent with its institutions.

[The following passage on the actual cogency of the law of nations is extracted from a lecture of the

English citizens, and especially of diplomatic agents, have been stringently enforced. Japan has been more liberally treated, owing to the competition of the United States. Both China and Japan, in their relations with each other and with other States, hold themselves amenable to the principles of the Law of Nations as understood in Europe and in the United States. Turkey was formally brought within the purview of the Law of Nations by the 7th Article of the Treaty of Paris of 1856, by which the Emperors of the French and of Austria, the Queen of Great Britain and Ireland, the King of Prussia, the Emperor of Russia, and the King of Sardinia, declare the Sublime Porte admitted "*à participer aux avantages du droit public et du concert Européens.*"—ED.]

[Editor delivered at the Inns of Court (*Lectures on International Law*, Stevens, 1874).

“ All this vacillating uncertainty, taken by itself, gives the most incorrect picture of the practical cogency of the great mass of the rules which compose the International Law of Europe. No war takes place in which the rules of International Law, in spite of all the accidental infractions of them, have not the most enormous influence over every step in the action of either Belligerent. The considerate treatment of prisoners; the respect for truces; the friendly attitude observed towards non-combatants and their property; and, above all, the validity of the broader principles which determine the rights and duties of Neutral States; are all facts equally unquestionable and momentous, which only escape attention from the rareness with which they generate disputes. Nor is the reality of International Law less conspicuous in times of peace. Not only do its rules determine the modes of incessant intercourse between the Governments of States, and even fix the ceremonious usages which mark the relative dignity of every ambassador or other State representative; but no sooner does a State, however lawless and rapacious, descry an opportunity for war upon its neighbours, than it appeals to the rules of International Law and bases its claim upon an alleged infraction of them. It might be sufficient, in final refutation of the notion that International Law is a fiction, to cite the important English statutes which have recently been passed in order to enforce upon English citizens the duty of co-operation with the State in complying with international obligations, and the records of recent litigation in the highest English courts arising solely out of disputed questions of International Law.”]

[BOOK III.

OF STATES AND THEIR RIGHTS.



CHAPTER I.

OF THE SOVEREIGNTY, INDEPENDENCE AND EQUALITY
OF STATES.

THE existence of an analogy between the Law of Nations and that kind of law (sometimes called "municipal" law) which regulates the mutual relations of the members of a particular state, depends upon an assumed resemblance in nature and situation of a private person and a State. Some such resemblance is, no doubt, to be found, and accounts for much of the language in which the Law of Nations has spontaneously clothed itself. But the resemblance is by no means so complete as is often supposed, and many of the fallacious modes of reasoning by which the subject has been infected are due to a prevalent misconception of the amount and quality of this resemblance. The resemblance, indeed, between a private citizen in a State and the State itself, as a member of a society of States, becomes less and less noticeable, as a simple monarchical system of government becomes exchanged, in one State after another, for more complex systems,—as a constitutional monarchy, a republic, or a federal government. The States contemplated by Grotius, Pufendorf and Vattel were subject either to a purely monarchical system of government or to a republican or federal system of the most inartificial type. Even England presented to foreigners the spectacle of a monarchical constitution scarcely less imperfect

[in dignity and vigour than France and Spain. In this way, when first the Law of Nations came to maturity, the persons who seemed the proper subjects of it were rather the individual rulers of every State than the several States themselves. The States were not only lost sight of in their governments, but the governments were almost eclipsed by their most conspicuous personal representatives. The analogy between municipal law and the Law of Nations thus seemed to be tolerably complete.

The political changes in Europe and on the continent of America during the last hundred years have had no more striking consequences than the altered conception which they have introduced of the true subjects of the Law of Nations, that is, States. The depression of ancient monarchies, the development and organisation of "nationalities" based upon race, the extension and substantiation of representative systems of government, and the diffusion of sentiments favourable to individual liberty and to public justice, have all contributed to release the State from a supposed identity with its personal ruler, on the one hand, or with a mere casual assemblage of individual atoms, on the other. The State is now, and henceforth, seen to be an aggregate of human beings (the number of whom cannot be definitely assigned, though both superior and inferior limits no doubt exist), having definite relations to territory, to social existence, to government, and to certain moral ideas, of which the ideas of a past and a future, and of a national unity, are the most dominant and unmistakable. From this enlarged, and yet (in some directions) circumscribed, conception of the State, other essential attributes of the State are derivatively deduced.

In modern text-books the most signal and decisive attributes of a State are usually said to be "sovereignty" and "independence." A formal distinction is not com-

[monly made between the import of these terms, though, from the way in which they are severally used, it would seem that the notion which underlies them is one of which *sovereignty* represents the positive, and *independence* the negative, side. The *sovereignty* of a State is the inherent capacity it enjoys to select, to maintain, or to change its own form of government; to exercise plenary civil and criminal jurisdiction over its own subjects; to alienate or (subject to the claims of other States) to acquire territory; to make, with other States, a fair competitive claim to the use of common things, such as the ocean and unoccupied territory; and to uphold, by every means in its power, the integrity of its existence both against external and internal enemies.

It is obvious that the sovereignty here described can only be fully exercised by any one State with the practical concurrence and co-operation of every other State. Thus the positive enjoyment and exercise of sovereignty implies, as its negative and essential correlative, *independence*; that is, exemption from every species of interference on the part of other States.

Theoretically speaking, nothing could be more intelligible or less artificial than these conceptions of sovereignty and independence. It happens, however, that, owing to historical and political causes, the States of the civilized world are so situated in respect to each other, that it is more true that the clear notions of sovereignty and independence have been, during the past century, only with the utmost difficulty liberating themselves and obtaining for themselves complete recognition than that they have been occasionally clouded and confused by anomalous facts. The progress of civilization itself, and the increased intercourse of modern States, have, by generating between them special ties of all sorts,—commercial, political, diplomatic and social,—done much really to impair the simplicity of the above notions. Furthermore, the internal revolutions and constitutional

[spasms which have of late convulsed the society of European States, have created a class of temporary, but very pressing, problems, incessantly demanding fresh solutions, as to the actual existence or non-existence of a new or old State, and its consequent claim to independence.

It has become the fashion among recent text-book writers to denote the modern complications in the fact and notion of sovereignty by, first, distributing sovereign States properly so called into those which are wholly, and those which are only "half," sovereign, and thereupon opposing all sovereign States of either kind to States which are either members of highly organized unions of States, or are closely associated together by a permanent league resting on a system of reciprocal treaties. Thus a "half-sovereign" State would differ from a sovereign State only in being liable to some permanent obligation (imposed otherwise than by treaty) in respect of a sovereign State. Such an obligation might consist in the liability to pay a yearly tribute, to furnish a military or naval contingent, to accord exclusive commercial privileges, or merely to rendering marked kinds of ceremonial respect. Instances of such States are supplied by Egypt and the European provinces over which Turkey claims peculiar rights, and by some of the native States of India. The late North German Confederation, the Swiss Confederation, and the United States of America, supply instances of "confederated unions" of States; while Austria and Hungary, Sweden and Norway, and, perhaps, the United States of America under the original Articles of Confederation, and before the existing constitution was settled, may severally be taken as illustrating the species of sovereignty in which the sovereignty of an individual state is limited by a permanent constitutional tie to another State. This constitutional tie may be of a variety of kinds, according as it owes its existence to purely historical causes,

[Or to a conscious regard to political expediency. Thus the mutual relations of Sweden and Norway, and of Austria and Hungary, resemble the relation of England to Scotland and to Ireland before the complete political union of these countries severally. The relations of the American States, on the other hand, as conceived by the Articles of Confederation, rather resembled the relations of States merely connected with each other by a treaty of alliance of indefinite duration, such as at various times existed between the different States of ancient Greece.

It will be conjectured from this description of the celebrated mode of classification adverted to, that its practical use and importance is very small. The classes into which it distributes States are either so large and indefinite in their limits, or, when broken up into parts, so prolific in microscopic details, that the only conceivable purpose of the classification fails of being reached. Either no proposition whatever can be predicated of any single class of States contemplated by the mode of arrangement, or any proposition which can be predicated is so large and general in its terms as to amount to little more than the announcement of a truism.

Nevertheless, the facts brought into relief by the affected classification of States according to the alleged gradations and modes of their sovereignty are, in themselves, of very great significance. They point, indeed, to the conclusion that, in a social and political constitution, such as that of modern European and American States, *sovereignty* and *independence* are terms too vague and abstract to be of practical use in political discussion, except when hedged about with such limitations as the actual circumstances of each particular State call for. The chief value of these terms is found in the general weight they give to two important principles which, when properly understood, in view of their applicability

[to the circumstances of special cases, are of great political consequence. One of these is the doctrine that no State is entitled to interfere with another, either in choosing or in changing its form of government, in managing its internal affairs, and, generally, in the exercise of its undisputed rights. The other is the doctrine that every State, strictly so called, is, for all purposes of political intercourse and ceremonial consideration, to be treated as the equal of every other State.

As to the doctrine of "non-interference," a very conspicuous march in public European opinion of late years can be clearly discerned. Considering the extremely delicate adjustment of the mutual relations of European States (especially the eastern ones), and the keen and increasing concern that each has in the stability and welfare of the rest, the adoption of any absolute doctrine in favour of holding aloof from the complications existing in neighbouring States would be scarcely possible. All that could be expected or even desired would be that the principles upon which alone intervention is justified, should be definitely ascertained, and that these principles, instead of being such as merely to prop up (as did the principle of the "Balance of Power") the accidentally subsisting relations to one another of a few preponderant and ambitious States, should be conceived in the interest of the smaller and most struggling, as well as in that of the most dominant, States.

That some such principles are, at the least, in course of formation may be gathered from the language used by the contracting parties in the treaty for the pacification of Greece, concluded in London on the 6th of July, 1827, between France, Great Britain and Russia; from the language used by Lord Palmerston in defending the quadruple alliance concluded in 1834 between France, Great Britain, Spain and Portugal,

[for "establishing internal peace throughout the Peninsula;"* and from that used by President Grant in commenting, in his message to Congress on December 7th, 1874, on the attitude of the United States to the revolution in Cuba;† as well as from the persistently cautious abstinence from even prejudicial sympathy,—and still more, from any expression of it,—observed by all the European governments during the late convulsive political changes in Italy, France and Spain successively.

The only grounds on which interference with the affairs of a foreign State would now be held capable of justification are—(1) the breach or attempted breach of a subsisting treaty,—as where a State is restricted by treaty in the amount of its armaments, or in the quality of its military defences; or else (2) the continuance of a revolutionary state of affairs in the foreign State under circumstances in which it seems highly probable that, without such interference, either public order can never be restored at all; or can only be restored after such sufferings to humanity and such injuries to surrounding States as obviously overbalance the general evil of all interference from without. No doubt the application in particular cases of these two principles is often a matter of the utmost difficulty, and must depend, for its success, on the honesty and political foresight of the State whose interference is solicited.

[* See Wheaton's "Elements of International Law," Part II., chap. I., and Woolsey's "Introduction to the Study of International Law," § 50.]

[† "The deplorable strife in Cuba continues without any marked change in the relative advantages of the contending forces. The insurrection continues, but Spain has gained no superiority. Six years of strife give the insurrection a significance which cannot be denied. Its duration and the tenacity of its advance, together with the absence of the manifested power of repression on the part of Spain, cannot be controverted, and may make some positive steps on the part of other powers a matter of self-necessity."]

[The most pressing and practical form in which the question of the justice or expediency of interference with the affairs of a foreign State presents itself at the present day, is when a revolution in that State is so far successful as to have resulted in the establishment of a well-organized and independent government over a considerable part of the national territory, or in the settlement of a new dynasty in the place of one more or less violently displaced, or in the seemingly final rupture of the relations between a parent State and its colonies resulting in the birth of a new State or new States.

The interference may take four different forms. A State may (1) confine itself solely to offering its friendly services to the contending parties by way of mediation or arbitration, whether in concert or not with other States. A state may (2) accord to the revolutionary party in a foreign State the rights of war which it would have were it in the position of an independent belligerent State. The concession of such rights may, at a certain epoch in the strife, be claimed both in the interests of humanity and of neutral States; there always, indeed, arrives a moment at which such a concession is made (as in the case of the late Southern insurrection in the United States) by the government from which the revolt takes place. The main difficulty is found in ascertaining the moment proper for what is called "recognition of belligerency." It must be neither so premature as to embarrass a friendly government in suppressing what may prove to be only a transient and partial display of disorder or treachery, or so dilatory as to protract the inconvenience and cruelty incident to a war conducted on a large scale apart from all the humane alleviations which the laws of war have introduced. The quality of the test for determining the moment at which interference for belligerent purposes only can be justified became a subject of earnest controversy during and after the late American

[civil war. The following passage, from a note of Mr. Dana's to his edition of Wheaton's *Elements* (p. 36), expresses so accurately the principles upon which the time of recognition must be fixed, that it may well be quoted in this place:—

“ To decide whether the recognition was uncalled for and premature requires something more than a consideration of proximate facts and the overt and formal acts of the contending parties. The foreign state is bound and entitled to consider the preceding history of the parties; the magnitude and completeness of the political and military organization and preparations on each side; the probable extent of the conflict by sea and land; the probable extent and rapidity of its development; and, above all, the probability that its own merchant vessels, naval officers and consuls may be precipitated into sudden and difficult complications abroad. The best that can be said is, that the foreign state may protect itself by a seasonable decision, either upon a test case that arises, or by a general prospective decision; while, on the other hand, if it makes the recognition prematurely, it is liable to the suspicion of an unfriendly purpose to the parent state. The recognition of belligerent rights is not solely to the advantage of the insurgents. They gain the great advantage of a recognized *status*, and the opportunity to employ commissioned cruisers at sea, and to exert all the powers known to maritime warfare, with the sanction of foreign nations. They can obtain abroad loans, military and naval materials, and enlist men, as against everything but neutrality laws; their flag and commissions are acknowledged, their revenue laws are respected, and they acquire a *quasi*-political recognition. On the other hand, the parent government is relieved from responsibility for acts done in the insurgent territory; its blockade of its own ports is

[“respected; and it requires a right to exert, against neutral commerce, all the powers of a party to a maritime war.”

The other forms which interference may take are—(3) active support either of a revolutionary party in a foreign State or of the government of the State in its efforts to suppress the revolution; and (4) public recognition for the purpose of general intercourse on equal terms of a newly formed, though perhaps not yet firmly established, government. The principles upon which interference of either of these kinds can alone ever be justified, and are now held to be alone justifiable, have already been adverted to. It need only be added here, that the recognition of a *de facto* government, no longer actually struggling with its armed enemies, requires very few special grounds of justification, while active interposition in a contest still progressing, requires very many.

The sovereignty or independence of States carries with it another principle which has important legal consequences, that is, the *equality* of States.

The real meaning of the doctrine of the equality of States is that, however politically feeble, or physically insignificant, a State may be, its claims in respect of sovereignty and independence—as those ideas have been already explained—are as irrefragable as those of the most influential and powerful State. Furthermore, the dignity of all States, as marked by the claims of their governments to courteous and respectful treatment at the hands of all other governments, is identical.

Nevertheless it is to be remembered that this doctrine of the equality of States is, in some measure, an artificial one, and very imperfectly corresponds with actual political facts. It demands, indeed, the utmost support it can derive from the Law of Nations to give it even a plausible show of validity, instead of being, as

[it is sometimes assumed to be, one of the pillars of that law. It might, indeed, be possible, for the purpose of sustaining the doctrine in question, to draw a distinction between legal and political equality; in other words, to say that all States are equal in respect of their claims to free and independent existence, however much they may chance to differ in respect of political weight and influence in the society of States. But it unfortunately happens that if a State is infirm in respect of real political influence, it is found to be practically infirm for the purpose even of defending the rights upon which its very existence depends. The proof of this is supplied by the number of treaties which exist among the leading European States, having for their objects, or for some of their objects, the guaranty of the independence and neutralization (in case of war) of the smaller and weaker States. The impotency of the bare sentiment of the equality of States, when tested in the tumultuous movements of the more powerful States, brought about by a great European crisis, was exhibited in the wars of the first Napoleon; and has been exhibited more recently by the conduct of Russia in her relations with Turkey; of France in respect of Savoy and Nice; and of Prussia and Austria in respect of Denmark. The hasty treaty concluded between England and France and Germany respectively, in the very crisis of the last war, for the better securing the neutralization of Belgium, is a more recent illustration of the practical limitations with which the doctrine of the equality of States must at present be received.

Another modification of this doctrine of equality, which at one time was of considerable importance, but which now has been reduced to its proper insignificance, is that due to the precedence of different States in respect of rank. Mr. Ward, in his "Enquiry," has devoted a very entertaining and instructive chapter to an elucidation of the historical aspects of this subject. The hierarchical

[order in which the claims of the Pope, of the Emperor of Germany, of States entitled to royal honours (among which the republics of Switzerland, of the United Netherlands, and of the United States were included), and of States either newly sprung from, or constitutionally dependent on, other States, were arranged was the result partly of Papal domination and direction, partly of spontaneous custom, partly of express convention. The maritime ceremonial honours due as between the ships of different States are now regulated by considerations of reciprocal courtesy on equal terms, and not by regard to legal claims. Questions of precedence, again, between the representatives of different States are now relegated to the general topic of the rights of ambassadors and other diplomatic representatives.

[CHAPTER II.

OF AMBASSADORS AND THE DIPLOMATIC INTERCOURSE
BETWEEN STATES.

THE continuous and active intercourse between the governments of modern States has given a prominence in the Law of Nations to the subject of ambassadors and diplomatic intercourse of a very different sort from that which it formerly possessed. Mr. Ward, in his "Enquiry,"* has described the successive steps by which, between the fifteenth and the seventeenth centuries, exceptional and transient embassies became transformed into frequent and lasting ones, and these again into general and permanent embassies. Mr. Ward has also illustrated his remarks by references to the national suspiciousness which attended the early practice of embassy, and the frivolous, though often disastrous, contentions for precedency which prevailed among the diplomatic representatives of the different States.

The instincts of good sense have, however, finally prevailed over the morbid susceptibility which in these respects so long attached to the leading European governments, and the legal situation, rights, and duties of every class of diplomatic representatives have now, either by treaty or by well-recognised usage, been ascertained with a very considerable amount of precision.

The right enjoyed by a State of sending a diplomatic representative must of course be exactly correlative with the duty incumbent upon another State of receiving one. The right of sending a diplomatic representative, and keeping him in residence at a foreign

[* Vol. ii. p. 477.]

[court, is now recognised as one of the inherent and essential rights of every true State, and a corresponding duty lies on every State of receiving, and permitting the continued sojourn of, such a representative. The only questions which have presented any difficulty in this matter relate either to the political qualifications of the State, or government of a State, which claims to send the representative, or to the personal objections which may be taken to any particular representative who happens to be nominated.

As to the political qualifications of the sending State or government, the question is rather part of one already discussed, that is, whether the notion of a gradation of States, in respect of sovereignty and independence, is admissible or not. With respect to confederated States, it will depend rather on the terms of the federal union than on general law whether any member of the union can or cannot claim to have a resident minister at a foreign court. In the case of a State which has only recently emerged into independence, the admission of its claim to have a permanent political representative, vested with the usual powers and privileges of a representative of a sovereign State, would be a decisive recognition on the part of the admitting State of the sovereignty and independence of the new State. On the other hand, the mere reception of a diplomatic agent from the *de facto* government of a *soi-disant* State, either for the conduct of a special class of negotiations, or for the more convenient management of all matters of political moment arising between the governments, could not be treated as the recognition of any general right on the part of the (perhaps only) provisional government to diplomatic representation. Each case of this kind must be treated on its own merits, and the only principle that can be laid down with any confidence is, that the right to send to the court of a foreign government, and to retain there,

[a diplomatic representative vested with all the rights and privileges which inherently belong to the highest classes of such officials,—and which will be briefly described lower down,—belongs, and belongs only, to a true State; though, whether it can be exercised as of right by a *de facto* government of that State must depend upon the fact of the actual recognition of that government (for such purposes at least) by the particular State in respect of which the claim to exercise the right is made.

The other question above alluded to touches the personality of the diplomatic representative selected. This question involves rather considerations of courtesy than of strict right, because if a foreign government resisted without avail the appointment of a particular representative, the end of the appointment, that is, the facilitation of intercourse between the two States, must be in a large measure frustrated. Thus the necessity of choosing a representative likely to be generally acceptable at the court to which he is commissioned is so commanding, that the abstract possibility of forcing a given representative upon a reluctant government is more a matter of curious speculation than of useful inquiry. The generally admitted principles, however, seem to be that a government is not entitled to object to the appointment of a diplomatic agent to itself, without assigning its grounds; and among these grounds, nationality, religion, rank and even sex* would not be held good, though the circumstance of the agent being one of its own subjects might be held a good ground of objection.

The sensitiveness to minute questions of ceremony by which the courts of the leading European States

[* Bynk. Lib. II. c. v. *Ratio utique feminas a legationibus non arceat, in feminis enim reperies quidquid in legatis desideraveris.*]

[were at one time distinguished, expressed itself in the competing claims of different States to employ diplomatic agents of different degrees of importance and dignity. It was understood that "ambassadors" proper, including the Pope's legates and nuncios,* could only be despatched by the limited class of monarchical and republican States which were held to be entitled to "royal honours." Such ambassadors were held to represent the very personality of the State on behalf of which they were sent, and they were entitled to no less ceremonious treatment than would be accorded to the executive authority of that State. Other diplomatic agents, as "envoys," ordinary and extraordinary, and "ministers plenipotentiary," represented their sovereign in his affairs pre-eminently, and in his person subordinately. Their capacity would seem to have been practically as ample as that of the former class, but their dignity inferior. A third class of diplomatic agents, that of *chargés d'affaires*, were held to be accredited to the minister, and not to the sovereign, of the foreign State; and to represent a minister, and not the sovereign, of their own.

The exigencies of the incessant intercourse between modern states gradually introduced a class of diplomatic agents intermediate in function and dignity between the second and third of these classes, that is, a class of resident ministers exempt from the traditional and ceremonious usages appropriate to ambassadors and envoys, transacting their business through the ministers of their own and the foreign government, and yet, in some way, representing the person and dignity of their own sovereign. The Treaty of Vienna, in 1815, between Great Britain, Austria, France, Prussia, Portugal,

[* *Nuncios* represent the Pope in the conduct of his affairs of all sorts; legates, who are cardinals, exercise in the Pope's name in Roman Catholic countries the spiritual functions which depend upon his recognition as head of the Church.

[Spain, Sweden and Russia, was accompanied by a protocol, having for its purpose "to prevent the embarrassments which had often occurred and might yet arise from the claims to precedence between different diplomatic agents." By this protocol, diplomatic agents were formally divided into the three classes first enumerated above, that is, into those of (1) "ambassadors, legates, or nuncios;" (2) "envoys, ministers, or others accredited to sovereigns;" (3) "*chargés d'affaires* accredited to ministers charged with foreign affairs." By a protocol of the Congress of Aix-la-Chapelle in 1818, to which Austria, Great Britain, France, Prussia, and Russia were parties, the intermediate class of agents, that of "resident ministers" noticed above, was formally recognised and inserted between the second and third classes of the protocol of the Treaty of Vienna. This last mentioned protocol also contained articles of the greatest value for the purpose of finally getting rid of the frivolous controversies for precedence among diplomatic agents which had often been fraught with the most serious consequences. The 4th article of the protocol of the Treaty of Vienna declared that "diplomatic *employés* should take rank among themselves in each class according to the date of the official notification of their arrival." By the 5th article, in each State "an uniform mode was to be determined upon for the reception of the diplomatic *employés* of each class." By the 6th article, "the ties of relationship or of family alliance between courts were to give no rank to their diplomatic *employés*, and the same was to be true of political ties." Lastly, by the 7th article "in these acts or treaties between the several powers which admit of the *alternat*" (that is, of varying the order of signature on some fixed principle), "the lot should decide between the ministers as to the order to be followed in signatures."

It is to be noticed that members of all the four classes equally enjoy the immunities and privileges incident to the right of embassy as described lower down.

[An ambassador (using the term in the generic and not the specific and technical sense) is furnished, on entering upon his mission, with two documents, which were, however, formerly combined into one. These are, the "Letters of Credence" and the "Full Power." The former is in the shape of a written communication from the sovereign of the sending State or his minister for foreign affairs, addressed to the sovereign of the receiving State or to his minister, as the case may be. The purpose of the letters is to identify the minister, and formally to guarantee him as a proper and responsible agent. The delivery of these letters to the sovereign was at one time an occasion of much ostentatious display. It now usually takes place in private, a copy of the letters having first been lodged with the minister for foreign affairs. Agents of the first class, that is, ambassadors proper, legates and nuncios, are still said to be able to claim a public audience.

The latter document, named "the Full Power," is in the shape of letters patent, advertising to all whom it may concern that the minister named in them is authorized to represent his sovereign in the way and to the extent therein described.

Nevertheless, it is obvious from the nature of the case, that the instructions contained in a document visible to all the world can never be an exact measure and adequate test of the real authority which is intended to be imparted by a sovereign to his agent. What are called "secret instructions," either express or implied, and either conveyed at the commencement of the mission or given or varied afterwards, must always accompany the "full power." These instructions are necessarily somewhat divergent from those implied in the full power, if only because they give increased precision to the circumstances under which the authority conveyed by the full power is alone to be exercised; and it is quite possible that, in some respects, the secret instructions may practically contradict the

[instructions implied in the full power. Thus a practical question of the utmost importance is presented as to the legal liability of a sovereign to ratify the acts of his diplomatic agent in cases where the agent has conformed to the instructions implied in the full power, but has not conformed to his secret instructions, supposing the different sorts of instructions to be at variance from one another. If the analogy of national law were applicable, no sort of secret instruction could qualify the liability of the principal towards others as measured by the overt engagement contained in the full power. But this is a signal illustration of the imperfection of the analogies so frequently drawn, and so rashly insisted on, between the rules of the Law of Nations and those of national law. A sovereign of a State is at the most a transient representative of the State itself, and his ambassador can, at the most, only bind him and not the State itself. Thus the better opinion at the present day is that there is no engagement made by a diplomatic agent, however wide the terms of his full power, from which his sovereign may not, if he conceives the necessity urgent enough, retreat. A good ground for taking such a (confessedly) extreme course would undoubtedly be that the agent had disobeyed his secret instructions. The refusal, however, to ratify an engagement made in exact compliance with a full power must be treated as a purely exceptional course, and one only to be justified by special considerations. In itself, it tends to bring into discredit the general character of diplomatic agents, and, to this extent, to impede the ready intercourse between States.*

There is no part of the law relating to diplomatic agents which is more certain in some parts of it and

[* The leading authorities are referred to and cited in Wheaton's *International Law*, Part III. chap. v. See especially Bynkershoek, *Lib. II. c. 7.*]

[more uncertain in other parts than that which defines the character and amount of the immunity of such agents from the criminal and civil jurisdiction of the courts of the territory in which they are residing. It has been attempted to simplify the statement of the doctrines applicable to the subject by resorting to the fiction of "extritoriality," whether as imputed to the person of the ambassador, to his residence, or to his property generally. This fiction proves, however, to be signally unserviceable in practice, as it just fails at the point at which a demand is made upon it, that is to say, when it is appealed to in order to solve a question of special and novel intricacy.

The general immunity of ambassadors, their families, and their suite, from the criminal and civil jurisdiction of the courts of the territory in which they reside, is said to be based, partly on considerations of courtesy, partly on impediments which a different practice might place in the way of a free discharge of his functions by an ambassador, and partly on the corrupt use which a State might otherwise, for political purposes, make of its judicial machinery.

Stated in its broadest form, it would seem that there is no process either of a criminal or civil court which can directly reach to the person or the property of an ambassador resident in the territory, or to his family or suite. Who are, for this purpose, to be comprehended in the ambassador's suite, beside the secretary of legation and the secretary of the embassy, has been a matter of much judicial controversy, and it is the practice now for the ambassador to anticipate the solution of such controversies by handing in to the minister for foreign affairs a list of all the members of the ambassador's household in respect of whom the privilege is claimed.

There are several leading cases (a brief epitome of which is contained in the 2nd volume of Phillimore's Commentaries on International Law, part VI., chap. VII.)

[in which the criminal immunity of ambassadors or members of their family or suite has been matter of judicial inquiry. The general result of all the decisions, as substantiated by the *consensus* of the most authoritative text-book writers, is, undoubtedly, that the only remedy which a State possesses against an ambassador resident in its territory for a breach of its criminal law, however heinous, is by way of request to his own government to withdraw him; that in case the crime, if a continuous one, is persisted in, or, if not continuous, is likely to be repeated, the State would be entitled to detain his person till such time as he could conveniently leave the territory. Such a step as this last, however, is said to have some of the characteristics of the commencement of war, and could only be justified by the same sort of extreme necessity by which war itself can alone be justified. In the case of a breach of the criminal law by members of the family or suite of an ambassador, the only available remedy is to hand the delinquent over to the ambassador himself, who would be held bound, in the event of his having no criminal jurisdiction himself—which in modern times is almost unknown—after making a *prima facie* investigation into the facts, either to send the delinquent to the country of the ambassador for trial and punishment, or to hand him over to the ordinary criminal courts of the country in which he is residing. The last course would be the most friendly one, and is that usually resorted to at the present day.

The difficulties involved in immunity from *civil* jurisdiction relate chiefly to those transactions in which the ambassador or members of his family or suite happen to be engaged, and yet which cannot possibly be regarded as in any way incident to the diplomatic functions of the embassy. Such transactions are engaging in trade, making contracts of various kinds, becoming a

[plaintiff in a court of justice, and the like. There seems to be no doubt (in spite of much argument to the contrary) that, even in respect of matters such as these, in which it might reasonably be held that the ambassador had waived his privilege, no real waiver takes place. The possible inconveniences and even political misunderstandings which might accrue from any attempt to seize the person or goods of an ambassador or of those under his immediate protection are of far too serious account to be put in the scale against the evil involved in the casual impotency of the local courts. It may be said, indeed, that it cannot be to the interest of an ambassador's own State that he should implicate himself in civil transactions, and the increased difficulty of his doing so, which his immunity from the usual process carries with it, is beneficial to both the States concerned.

On the general principle of immunity from civil process is based the special privileges of the ambassador's residence or so-called "hotel." It is still a disputed point whether an ambassador's "hotel" can be entered for the purpose, say, of following and arresting a felon. It is confessed, however, on all hands, that, at the least, a special notice would be required for the purpose, and while, on the one hand, it would scarcely be tolerated in modern times that an ambassador's hotel should be converted into an asylum for fugitive criminals, on the other hand, it may always be expected that an ambassador will readily co-operate with the reasonable demands of public justice.

Besides the immunities already considered, the privilege of having public worship performed in the precincts of the ambassador's hotel in spite of the general laws which may disallow the free exercise of that, or of any other than one particular form of public worship, is undoubted, and it is a privilege which, for obvious reasons, is, in some countries, greatly prized.

[Certain limitations have, however, been admitted to the full recognition of this privilege, as, for instance, that no bell must be rang or other sign given to attract the passers by, though these limitations are frequently, by special courtesy, dispensed with.

It has been much questioned as to how far the usual privileges and immunities of an ambassador can be claimed for one passing *en route* to and fro between the territory of his own State and the territory of that to which he is sent. It would seem that he ought, at the least, if his political character be known, and transit be not refused, to enjoy all the facilities for transit which would be accorded to the most favoured subject of the State, but that, in the event of his being accused of committing a breach of the law, his person might be detained till reparation from his own government had been obtained.

Consuls are a class of diplomatic agents in the great central and provincial towns of a country who do not enjoy any of the special privileges attached to the classes of agents already described. They are sometimes citizens of the State in the territory of which they reside. They enter upon the discharge of their functions by permission of the sovereign of that State, conveyed in a document termed an "exequatur," but the refusal to receive a foreign consul is no breach of the Law of Nations. Their customary functions are to give advice and assistance to such citizens of the State they represent as may need it, to uphold their interests by due representations in the proper quarter, to witness certain public acts and the signatures to certain documents, and to exercise a certain voluntary jurisdiction by way of arbitration, especially in matters of commerce. A consul is presumed to be entitled to the same privileges as his predecessors have enjoyed.

[By special treaties the functions of consuls are often greatly enlarged, so as to comprise a certain amount of civil, and even of criminal jurisdiction, in cases in which citizens of the State they represent are concerned. It is under such treaties that the English consulates in the Levant and in China are established.

[CHAPTER III.

OF THE GENERAL RIGHTS OF STATES.

INASMUCH as the only ground of a just war is either the actual, or the apprehended violation of a *right*, it is of the utmost importance to determine what are the rights of States in their relations with one another. These rights exist either independently of special treaty engagements, or through the medium of such engagements. It will be convenient to consider the former class of rights, those existing independently of treaty, first.

SECTION I.

Of Rights independently of Treaty.

The largest and most important of these rights are those that relate to a State's territory, ships of war, and citizens. In modern times, the territory of a State is an essential element in the structure of the State itself, and, in fact, the ideas of a State and of its territory cannot be disjoined. Nevertheless, the modes of acquiring fresh territory, of acquiring rights in the territory of another State, of using for certain definite purposes the territory of another State, and, especially, of exactly marking the confines of a State's territory, whether composed of land or water, are matters requiring exact legal circumscription, if controversies are to be prevented, or to be readily settled after they have arisen.

The only two modes of acquiring territory in modern times are "Occupation" and "Cession" by treaty, whether following upon a war or not. It would seem at the

[present day that a right by Occupation is strictly limited to the case of land absolutely uninhabited, and that in the case of colonising an already inhabited country, annexation of territory can only take place by interposing the fiction of a spontaneous cession on the part of persons representing the government of the native inhabitants. It is well known that the government of the United States has persistently—in practical accord with what is somewhat misleadingly called “the Monroe doctrine”—resisted the foundation of any fresh European colony on the American continents.* With respect to occupation of territory, either never inhabited or relinquished by its inhabitants, the maxims of Roman law—which (in this case as generally) are coincident with good reason—apply, that actual possession must be taken, and there must be a real intention to appropriate.

Treaties of Cession are either made at the close of a war—since no property passes by the mere act of conquest,—where they form part of the treaty of peace; or they are made during peace for the purpose of adjusting boundaries, of making mutually advantageous exchanges or sales, or of strengthening a weak State by uniting its territory to that of a strong one, and thereby creating a fresh aggregate State.

It sometimes happens that a State finds it convenient or necessary to burden its territory with some temporary liability in favour of another State, and such a burden has been likened to a servitude or easement created in favour of that State. Here again the peril of an insufficient analogy has to be guarded against, lest untrue deductions be rashly drawn from premises too readily admitted.

[* A full account of the controversy arising out of President Monroe's message to Congress in 1823 will be found in Dana's note to his edition of Wheaton's “Elements,” Part II. chap. I. See also Woolsey, § 47, and as to the general principle, Heffter, § 71.]

[Thus it has not been infrequent for a State to engage with another adjoining State that the armies of that State shall have a right of passage over its territory, or that its straits and inland seas shall be open for navigation, or that certain rights of free passage or postal communication shall be guaranteed to the citizens of the other State. As might have been expected, such engagements have been most common in the transactions between the States of Germany, though most of the great treaties by which the mutual relations of the leading States of Europe have been from time to time ascertained and settled present instances of them. The method usually resorted to of determining the boundaries between the territory of adjoining States is that of reference to a mixed commission, or to a single arbitrator. A recent instance of a reference of a boundary dispute to a single arbitrator is supplied by the Treaty of Washington, made between the United States and Great Britain in 1871, by the 34th Article of which a boundary question, referred by a former treaty to commissioners, who found themselves unable to agree, was again referred by them to the "arbitration and award of his Majesty the Emperor of Germany." His Majesty has since published his award.

Besides its rights in respect of its territory, a State is held to have certain inherent rights in respect of its ships of war and its citizens.

It is sometimes said that a ship of war, and even a merchant ship,* is part of the territory of the State to which it belongs, and a claim of what is called "exterritoriality" is sometimes set up, on this ground, on behalf of a ship of war in a foreign port. These expressions, based on a delusive analogy, are never very serviceable, and in the present case the fiction is equally

[* See the authorities on the different sides of the argument in the letter of Historiens (Sir W. Harcourt) on the "Territoriality of the Merchant Vessel," Macmillan, 1868.]

[transparent and worthless. It is a matter of obvious comity, if not of law (and this point cannot be regarded as settled), for every State to open its harbours at all times to the ships of war of every other friendly State; but the better opinion seems to be that the State, to the harbour of which a ship of war of another State has betaken itself, has no criminal jurisdiction over the persons in that ship in respect of offences committed on board the ship. In this is said to be the difference between the situation of a ship of war and a merchant ship, though this difference, so far as it operates to the prejudice of a merchant ship, is not insisted on by all States.*

It need scarcely be noticed, that if a State is bound up ideally as well as physically with its territory, it is still more closely bound up with the personality of its citizens. Every State is legally bound to protect from violence, at least to the extent to which it affects to protect its own citizens, the citizens of another State whom it may have invited either tacitly or expressly to travel or sojourn in its territory. It cannot be said that a State is compelled to admit the citizens of other States within its dominions, though it would be a serious discourtesy, calling for special explanation, and possibly for retaliation, to refuse to one State what was accorded to others. Nor is a State legally responsible if it thinks fit to take exceptional precautions, as by insisting on passports and the like, in order to exercise a special police surveillance over such foreigners as may pass its frontiers or arrive in its ports. Nor again is a State bound to place foreigners on an equal civil and political footing with its own citizens, or absolutely to guarantee them against such accidents and miscarriages of justice as cannot but occasionally befall citizens and foreigners alike. All that a State is bound to shew is an honest

[* The leading cases are given in some detail in Wheaton's "Elements," Part II. ch. II.]

[and determined intention to protect the life, property and liberty (within such limits as this last is generally accorded in the country) of every foreigner sojourning in its territory, so long as he conducts himself in a manner conformable to law. This topic is one of considerable importance, as ill-treatment of foreigners is peculiarly apt to generate sentiments of irritation between States, and so to be the preliminaries of war. The principles, however, applicable to the subject are now well ascertained and placed beyond dispute.

An obvious right enjoyed by every State equally is the claim to have an equal share in the enjoyment of such things as are in their nature common to all, whether from not being susceptible of appropriation, or from not having been as yet, in fact, appropriated. Such a thing, pre-eminently, is the open sea, whether treated for purposes of navigation or of fishing. A celebrated controversy at one time prevailed as to whether a narrow sea, such as the "Straits of Dover," could, in any sense, be said to be susceptible of appropriation by either of the States the territories of which form its two coast lines. Grotius in his "*Mare Liberum*," and Selden, afterwards, in his "*Mare Clausum*," supported the opposite sides in this controversy. The allegation of Grotius, directed chiefly against the claims of the Portuguese, that the high seas cannot be appropriated in any sense, has finally prevailed.

Nevertheless, for some limited purposes, a special right of jurisdiction and even (for a few definite purposes) of dominion, is conceded to a State in respect of the part of the ocean immediately adjoining its own coast line. The purposes for which this jurisdiction and dominion have been recognised are—(1) the regulation of fisheries; (2) the prevention of frauds on customs' laws; (3) the exaction of harbour and light-

[house dues ; and (4) the protection of the territory from violation in time of war between other States. The distance from the coast line to which this qualified privilege extends has been variously measured, the most prevalent distances being that of a cannon-shot or of a marine league from the shore. By the British Hovering Act (9 Geo. 2, c. 35, s. 23) a jurisdiction of four leagues from the coast is assumed for certain revenue purposes, foreign goods not being allowed to be transhipped within that distance without payment of duties. In the case of bays, harbours, and creeks it is a well-recognised custom, provided the opening be not more than ten miles in width as measured from headland to headland, to take the line joining the headlands, and to measure from that the length of the distance of a cannon-shot or of a marine league. The limiting provision here introduced was rendered necessary by the great width of some of the American bays, such as the Bay of Fundy and Hudson's Bay, in respect of which questions relating especially to rights of fishing had arisen. At one time indeed the distance of six miles in place of that of ten miles was contended for. It is held that, in the case of straits or narrow seas less than six miles in breadth, the general jurisdiction and control is equally shared by all the States the territories of which form the coast lines, and that all the States are held bound, in times of peace at any rate, to allow a free passage at all times to the ships of war of all other States. The use and control of narrow seas is sometimes subjected to special limitations by treaty, as in the case of the Black Sea by the Treaty of Paris of 1856.

A peculiar class of rights in respect of the use of the open sea is that implied in the general jurisdiction which belongs to every State for the purpose of preventing and punishing outrages upon the rights of all States. Such an outrage, pre-eminently, is *piracy*.

[The fact of there being such a crime as piracy has never been doubted since the Law of Nations acquired its modern form, nor have the chief elements of the crime been matter of doubt. The exact nature and number, however, of the offences comprehended by the term is still a matter of uncertainty, and the text-book writers* have been in great perplexity in their search for a satisfactory definition. The characteristic elements in the crime of piracy are—(1) a violation, actual or attempted, of the general rights by sea of all States, whether in respect of persons or things; and (2) an absence of allegiance to any one State, or an intention, actual or presumed, to establish an organisation subsisting by general rapine. Evidence of this intention has been held to be supplied by the fact of the commander of a ship accepting commissions from two opposed belligerents, or from a ship's crew throwing off all allegiance to their own captain and engaging in indiscriminate acts of pillage. The punishment for piracy, when detected in the act, was at one time universally death. It is now held that each State is entitled to visit the crime with the penalties which its own laws may determine.

It has been much argued whether the act of engaging in the slave-trade can be treated by the Law of Nations as piracy. The opinion seems decidedly to be that in the present division of sentiments on this matter on the part even of those States which hold themselves to be subjects of the Law of Nations, it is impossible to allow the act of engaging in the slave-trade to be treated with the absolute and peremptory rigour with which piracy is properly visited. It is a matter for the private engagements of particular States, so far as they may affect to bind the actions of their own citizens, and

[* See Dana's note in his edition of Wheaton's "Elements" and the authorities cited in it, Part II. ch. II. See, also, Woolsey, § 137, and Heffter, § 104.]

[for their joint action also in those cases in which a ship engaging in the trade does not belong to any recognised State. Thus, it does not seem that the mere act of a ship's master and crew engaging in the slave-trade can of itself be treated as putting them out of the protection of their own State. The subject of *piracy* will be recurred to lower down in connection with that of *privateers*.*

More questionable rights than any of the above are those to commerce, to general comity,—as in respect of ceremonial,—to patent and copyright legislation, and to the extradition of prisoners. It is not a very practical problem, in the present day, to determine how far it would be a ground for war, if a State refused to recognise in favour of another State rights of this description. The only cases in which it has been practically attempted to enforce them in modern times have been where the recalcitrant State has been too weak to resist, or too much isolated to be protected by the public opinion and conscience of Europe, as embodied in the Law of Nations; and even in these cases the monstrosity of the interference has been partially veiled by interposing a forced treaty. The history of the modern relations of England with China† supply abundant illustrations of the mode in which these *quasi*-rights are, in practice, alternately ignored and arbitrarily enforced.

SECTION II.

Of Rights accruing by Treaty.

The above classes of rights exist independently of treaty, or else,—as in the case of commercial rights, international copyright and patent-right, and rights to the extradition of fugitive criminals,—are recognised as being of that doubtful sort that they are practically

[* See p. 159.]

[† See Dr. Bridges' article on "England and China" in the "*Essays on International Policy*" (Chapman and Hall, 1866).]

[valueless unless fortified by treaties. Thus there is a very large and important class of rights, especially those which are the subject-matter of a treaty of peace, which owe either their whole, or their main, support to the express conventional engagements of States.

The multitude of subsisting treaties, to which every State in the world is at the present day a party, and the boundless variety of topics with which they deal, is a remarkable tribute to the practical force which is attributed to the good faith of States.

There are many important particulars in which treaties differ from private contracts, though the parallelism with the doctrines of Roman law, which has characterised the historical growth of the Law of Nations, has naturally brought into relief rather the points of resemblance between treaties and contracts than the points of difference.

The most prominent mark of distinction between a treaty and a private contract is discoverable in the fact that treaties between States are the only forms of *conveyance* known to the Law of Nations. It is true that by some systems of national law,—as in certain cases by French law and English “equity,”—what was primarily intended as a mere engagement to sell is made to operate as an actual sale; and, still more frequently, the same document is made to serve the purposes both of transferring property and of preserving evidence of a contract as to acts to be done in the future. But in the Law of Nations, such a document as a one-sided conveyance or legal act is unknown. Every settlement of disputed claims, and every cession, sale, or exchange of territory, can only take place and be effectually confirmed through the medium of a treaty entered into by the two or more States concerned. Even those arrangements which concern the boundaries of territory, and which are intended, from their nature, to be as lasting as the States themselves, are not only guaranteed and

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[fortified by treaties, but can only be expressed and carried into effect by the language and interposition of treaties. This comes about indeed from the inherently consensual characteristics of the Law of Nations itself. The basis of every arrangement and institution must be sought for in actual or presumed consent; and that basis is valid and immovable in proportion as the consent is express and unequivocal.

Another important distinction between treaties and private contracts is connected with the former one, and, in fact, flows directly from it. A valid private contract is always held to imply the unbiassed and deliberate intention of the contractors. The presence of such an amount and kind of force or fraud as may reasonably be held to have hindered one of the contractors either from taking an adequate view of his own interests and of relevant surrounding facts, or from acting in compliance with the dictates of his interests when ascertained, is, in all systems of national law, held vitally to impair the legal validity of the contract. Not so in the case of treaties under the Law of Nations. The most important class of treaties—treaties of peace—are invariably made under circumstances of the most aggravated physical pressure. They are, in fact, wrung from one of the parties at the point of the bayonet. Nevertheless, though this fact really qualifies the actual cogency of such treaties, it does not qualify their legal cogency in the minutest degree. No war, indeed, could ever come to an end, if such treaties had not an indefinite amount of formal validity arbitrarily imputed to them. It is, however, a matter much to be regretted, that the occasion of making treaties of peace has usually been taken as suitable for arranging general settlements of the relations of a variety of States, and for closing a number of controversies which have long been open sores. A treaty of peace always leaves one party, and generally more than one, grievously discontented, and strongly con-

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[cerned, if not firmly resolved, to upset it at the first favourable opportunity. Thus, settlements and arrangements which ought to have been finally placed on the most unassailable foundation become infected with the looseness of the structure to which they are accidentally attached.

Professor Mountague Bernard, in his Lecture on "The Obligation of Treaties," published in 1868, among his *Lectures on Diplomacy*, gives some interesting historical illustrations of the devices at one time resorted to for the purpose of giving to treaties an obligatory force which they did not seem inherently to possess. He says (p. 190) that "to the earliest extant treaty of mediæval Europe, negotiated in the sixth century, and recorded by Gregory of Tours, the parties swore 'by the name of God Almighty, by the Indivisible Trinity, by all divine things, and by the dreadful day of the last judgment.' On the Cross, on the four Gospels, on the canon of the mass, and on my honour, is the form used in Spanish treaties of the sixteenth and seventeenth centuries." Professor Mountague Bernard goes on to say that between the thirteenth and sixteenth centuries the artificial securities were prodigiously multiplied. "An oath was not enough; the sovereign must swear that he would neither obtain, accept, nor profit by a papal dispensation from his oath; he must submit himself expressly to the censures of the Church; to 'excommunication, aggravation, re-aggravation, interdict, anathematisation, and other heavier censures and fulminations whatsoever;' and for this purpose must undertake to appoint within a fixed period proctors authorized to appear and record his submission before the Pope or some other ecclesiastical judge in due form of law. If, like the French kings, he had the privilege of not being excommunicated except after certain formalities, he must renounce the privilege. He must release, in case he should perjure himself, his vassals from their

[“allegiance, must pledge and hypothecate ‘his lands
 “‘and goods, and procure a crowd of sureties to do the
 “‘same.’ In the ‘perpetual peace’ concluded between
 “Francis the First and Henry the Eighth in 1527,
 “two archbishops, eleven bishops, twenty-eight nobles
 “and thirteen borough towns are inserted as such
 “sureties on the English side. Lastly, he must deliver
 “hostages or promise to deliver them. These are the
 “common forms employed in framing treaties by the
 “lawyers of the reigns of Louis the Eleventh, Louis
 “the Twelfth, and Francis the First; and they are
 “repeated again with a patience and a prolixity which
 “are amazing, when we observe how quickly and with
 “what levity the treaties themselves were broken.”
 Professor Mountague Bernard adds, that “of all these
 “multiplied securities none survive. Hostages have
 “not been given in Europe since the Earls of Sussex
 “and Cathcart were sent to Paris in 1748, as pledges
 “for the restitution of the conquests made by Great
 “Britain during the war of the Austrian Succession.
 “The ancient and pious formula, ‘in the name of
 “‘Almighty God,’ which stands at the head of the
 “Treaty of Paris, 1856, remains a last relic of the
 “natural sentiment that a great public act, such as
 “a treaty of peace, is suitably clothed with the
 “solemnities of religion.”

The only securities for the observance of treaties attainable in the present day, over and above the constantly increasing force of public opinion, are (1) subsidiary treaties of guarantee entered into by third parties, and (2) the occupation of territory by way of a material pledge. The latter is often resorted to in order to enforce some of the terms of a treaty of peace, especially in respect of paying the expenses incurred by the victorious party in conducting the war.*

[* It is worth notice that on the late occasion of Russia demanding a revision of the Treaty of Paris of 1856, one of the earliest steps in the proceedings taken by the plenipotentiaries at London was to re-

[An important question has been raised in modern times, especially between England and the United States, as to whether treaties existing between two States are, or are not, annulled by the mere fact of the breaking out of a war between those States. The point was largely discussed, both very recently and in 1815, in reference to the rival claims of the citizens of the United States and of Canada in respect of fisheries on the Canadian coast. The claims of the opposing parties rested upon the legal operation of the war of 1812 between Great Britain and the United States, upon the treaties entered into by the two governments in 1783 and 1794.* The conclusion reached by the American minister, Mr. J. Q. Adams, in his communication with Earl Bathurst in 1815, would certainly seem to be most reasonable and likely to command general assent should a like controversy be stirred again. It was to the effect that "there were many "exceptions to the rule by which the treaties between "nations are mutually considered as terminated by the "intervention of a war; that these exceptions extend to "all engagements contracted with the understanding "that they are to operate equally in war and peace, or "exclusively during war; to all engagements by which "the parties superadd the sanction of a formal compact to principles dictated by the eternal laws of

assert in emphatic terms the binding force of treaties unless their provisions are specially relaxed by a friendly arrangement made by the contracting parties. The Protocol of the first sitting of the 17th January, 1871, is in the following words:—"Les plenipotentiaires de l'Allemagne du Nord, de l'Autriche-Hongrie, de la Grande Bretagne, de l'Italie, de la Russie, et de la Turquie, réunis aujourd'hui en conférence, reconnaissent que c'est un principe essentiel du droit des gens qu'aucune puissance ne peut se délier des engagements d'un traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des parties contractantes, au moyen d'une entente amicale. En foi de quoi lesdits plenipotentiaires ont signé le présent Protocole. Fait à Londres, ce 17 Janvier, 1871." Annual Register, 1871.]

[* See for a general account of the discussion and a *résumé* of the main arguments, Wheaton's "Elements," Part III. chap. II.]

[“morality and humanity; and, finally, to all engagements which, according to the expression of the “British note, are *in the nature of perpetual obligation*.” The somewhat vague expression in the last sentence is controlled and defined by making it exactly comprehend the treaty of peace of 1783, by which it was affected to settle the permanent relations of Great Britain and the United States. The engagements mentioned in the sentence immediately preceding are explained to be such as have in view the abolition of the slave-trade.

It depends on the constitution of a State in what person or persons the authority to make a treaty vests. For instance, in England the sovereign can make a treaty without consulting parliament, as of necessity, though it is customary to acquaint parliament with the fact of such a negotiation having been completed, and in some cases—especially if money be needed to carry it into effect—the treaty is laid on the tables of the two Houses before it is ratified. In the United States, the treaty-making power is the President and Senate, of which latter body two-thirds must concur. In the negotiation of a treaty, of course the several parties cannot be expected to acquaint themselves with the limitations on the authority of the person or persons who are *de facto* recognised in their own State as its representatives. So far as the authority of diplomatic agents is concerned, the case has been already examined. It would no doubt be held a grave discredit to a government if they made a treaty which the constitutional forms of their own country did not enable them to carry into effect; and thus, while a general obligation lies upon an executive government to take all the needful steps at home to carry into effect a treaty they have concluded, there is also a like general moral obligation on the legislative authority of a State to lend its aid for the same purpose.

The mode of drawing treaties is rather a matter of

[diplomatic than of strictly legal science and art. But the doubly representative character of all the persons who conclude them has had the effect of making the process of drawing them a tedious and harassing one. The result has been much the same as with English acts of parliament. The same document has been at once technical and popular in verbiage, loose and pedantically precise in the use of terms and phrases, sweeping and minute in the comprehension of materials. Every element, in fact, which could lead to vacillation of construction and difficulties of interpretation, even on the part of disinterested judges, has rioted to the full. It may be expected that one of the indirect consequences of the revived study of Roman Law in England and of the growing desire to have the Law of Nations re-published in a systematic form, will be the introduction of a common language of universal application in the wording of treaties. In this way the difficulties of interpretation which remain will be reduced to those which are incidental to the imperfection and flux of language itself.*]

[* On this subject, Sir H. S. Maine's remarks in his essay on Roman Law and Legal Education (*Cambridge Essays*, 1856) will be found apposite:—"Englishmen, however—and the critics alluded to are mostly "Englishmen,—will always be more signally at fault than the rest of "the world in attempting to gain a clear view of the Law of Nations. "They are met at every point by a vein of thought and illustration "which their education renders strange to them; many of the technicalities delude them by consonance with familiar expressions, while "to the meaning of others they have two most insufficient guides in "the Latin etymology and the usage of the equivalent term in the non- "legal literature of Rome * * * There cannot be a doubt that "our success in negotiation is sometimes perceptibly affected by our "neglect of Roman Law; for, from this cause, we and the public, or "negotiators of other countries constantly misunderstand each other. "It is not rarely that we refuse respect or attention to diplomatic "communications, as wide of the point and as full of verbiage or conceits, when, in fact, they owe those imaginary imperfections simply "to the juristical point of view from which they have been conceived "and written. And on the other hand, state papers of English origin,

" which, to an Englishman's mind ought, from their strong sense and
" directness, to carry all before them, will often make but an incon-
" siderable impression on the recipient from their not falling in with
" the course of thought which he insensibly pursues when dealing with
" a question of public law. In truth, the technicalities of Roman Law
" are as really, though not so visibly, mixed up with questions of
" diplomacy as are the technicalities of special pleading with points of
" the English common law. So long as they cannot be disentangled,
" English influence suffers obvious disadvantage through the imperfect
" communion of thought. It is undesirable that there should not be
" among the English public a sensible fraction which can completely
" decipher the documents of international transactions, but it is more
" than undesirable that the incapacity should extend to our statesmen
" and diplomatists. Whether Roman Law be useful or not to English
" lawyers, it is a downright absurdity that, on the theatre of inter-
" national affairs, England should appear by delegates unequipped
" with the species of knowledge which furnishes the medium of intel-
" lectual communication to the other performers on the scene."]

BOOK IV.

OF WAR.



CHAPTER I.

OF THE RIGHT OF MAKING WAR.

ALTHOUGH the word *war* is in such common circulation, Definition of war. yet it is not easy to give an exact limitation of this term as strictly used in the Law of Nations, and entailing certain results and liabilities from the fact of its existence. For war does not exist merely on the suspension of the usual relations of peace, there being many occasions wherein the intercourse of States is interrupted that do not constitute the relation of war. Thus, in 1753, Spain and Denmark respectively interdicted their subjects from all commerce with the other State, (1) on account of some differences regarding the Danish trade with Morocco, and this suspension continued for four years, but it was not a state of war. Again, in 1793, the Emperor of Russia broke off all communication with France; declared the treaty of 1786 to be suspended; forbade all French vessels to enter his ports, and banished from his dominions all French of both sexes, excepting those who would take an oath abjuring the principles of the French Revolution; (2) but though the usual relations of peace were thus suspended, yet it was not a state of war. According to Albericus Gentilis, “*Bellum est publicorum armorum justa conten-*

(1) De Martens, Rec. Supp. II. 14—17. (2) *Id.* Rec. v. 408.

tio;"(1) and Bynkershoek says, "Bellum est eorum, qui suæ potestatis sunt, juris sui persequendi ergo, concertatio per vim vel dolum;"(2) and Vattel defines war as "that state in which we prosecute our rights by force;"(3) but unhappily there have been too many wars undertaken for the pursuit of no right, and without a shadow of justice for their excuse, to allow either of these definitions to stand. Grotius defines war as "the state of those contending by force;"(4) and Hobbes says, "war is nothing else but that time wherein the will and intention of contending by force is either by words or actions sufficiently declared."(5) But neither of these definitions will hold good, because there are a variety of instances in which States contend by force that do not constitute war. Reprisals, for instance, and embargoes, are both forcible measures of redress, but they do not constitute war; and when States send auxiliary forces under special treaties, they contend by force, but there is no war, although thousands of subjects may be destroyed on either side. In the truce for ten years, concluded in 1470, between Henry VI. and Louis XI., it was declared, that should either party surprise any town or castle of the other, the latter might besiege or assault the same, or gain it in any other forcible manner, without the truce being thereby broken or infringed (*rompez ne enfrainz*), and the party injured was to recover from the other the amount of the damage sustained by the surprisal.(6) Thus, there are various cases in which force is used for special purposes, and under certain stipulations, where no war takes place; but when there is an indeterminate state of violence, then there is war; in the words

(1) De Jure Belli, lib. I. c. II.

(5) De Corpore Politico, P. I.

(2) Quæst. Jur. Pub. lib. I.

c. I. § 2.

c. I.

(6) Dumont, Corps Dip. III.

(3) Liv. III. ch. I. § 1.

I. 601.

(4) De Jure, lib. I. c. I, § 2.

of De Martens, "*la guerre est un état permanent de violences indéterminées entre les hommes.*" (1) War may, therefore, be defined to be the condition of States between which there is an interruption of all pacific relations, and a general contention by force, authorized by the sovereign of the several States.

Nations being in a state of nature with respect to each other, and having no common superior to whom they may appeal for the settlement of their differences, have no means of securing their rights, where peaceable negotiations fail to obtain them, but redress or defence by forcible means. Some authors have thought it necessary to enter at length upon the question whether any appeal to force is ever justifiable, and whether a quaker-like submission to any wrong is not incumbent upon States; but, without occupying time with such discussions, I may perhaps be allowed to take it for granted, that there may be some occasions that justify appeal to arms. By the Law of Nature no such submission to violence is required; to the people of Israel, wars were permitted and enjoined under Divine dispensation, and by our Christian faith no injunction, express or implied, was given to that purport; although, doubtless, the principles of Christianity, by commanding an abstinence from wrong-doing, would, if pursued universally, make appeal to arms unnecessary, and banish war from the list of human evils. That war may be sometimes necessary, and therefore sometimes justifiable, in the present state of mankind, appears incontrovertible; and the questions regarding it would be of easy solution, if it were only when war was necessary that arms were employed. Unhappily, the blood that has been shed in the prosecution of right is quite inconsiderable, when compared with that which has been lavished from law-

War sometimes justifiable.

(1) Précis du Droit des Gens, liv. III. ch. II. § 263.

less aggression, or the unjustifiable grasping of individual ambition.

Right of inter-
vention: diffi-
culty of laying
down general
rules.

Besides the obvious case where actual or threatened aggression justifies appeal to arms as a means of self-defence, there are many cases in which war may be necessary, and therefore just; but I do not find any general rules, laid down by any writers, that are satisfactory in ascertaining when such justificatory occasions take place. General rules for political action are too frequently either needless because obvious, or useless because they afford no additional light, but still leave each individual question to be determined by its own bearings. Thus, that there are occasions in which the affairs of neighbouring States render appeal to arms necessary, cannot be doubted. When the French Convention announced themselves as the enemies of all constituted authorities, and proclaimed, in November, 1792, that "they would grant fraternity and succour to any people who were disposed to recover their liberty," (1) it cannot be doubted that, if there were a probability of these declarations being carried into effect, it was not only the right, but the duty, of neighbouring governments to arm in their own defence; and, if there were no other method of averting the threatened aggression, encounter the partial evil to the community, war, great as that evil is, rather than submit to that total ruin of the community which must result from the forcible propagation of anarchy. Such extreme cases are of easy solution, and need no general rules for guidance; it is clear to every one that, in the words of Lord Grey, "there are certain principles of interference connected with the rights of self-defence, which justify and render interference necessary." (2) But, when general rules have been laid down, they are usually of

(1) Alison, *Hist. French Rev.*
I. 433, 434.

(2) Speech, 9th August, 1831.

such an indefinite character that they do not lead one step nearer to the truth, or even to uniformity of action; as different ministers may exactly coincide in recognising the same general principles, and yet pursue completely different policy as the deduction from those principles. For instance, the best limitation I have seen of the right of intervention,* is that given by Lord Castlereagh in his note on the affairs of Spain, communicated to the courts of Austria, France, Prussia and Russia, in May, 1820: he says, it consists in a state of things in a foreign country, which threatens other States with "that direct and immediate danger, which has always been regarded, at least in our own country; as constituting the only case which justifies foreign intervention." (1) The Congress of Verona needed no greater scope than was given by this definition; (2) but how different was the practical interpretation of this general principle, as given by this country, and by the monarchs at Verona. In the same manner, the cabinet of Lord Grey expressly proclaimed the principle of non-intervention; but on comparing the above quotations from Lord Grey and Lord Castlereagh, it will be seen that Lord Aberdeen was correct in saying, that "the present definition of the right of intervention agreed, even in words, with that laid down by Lord Castlereagh." (3) But how different would have been the interpretation of this definition afforded by the policy of the two ministers!

(1) De Martens, Rec. Supp. X. 1. 176.

from Verona. De Martens, id. 178—195.

(2) See the notes of Bernstorff, Nesselrode, and Metternich,

(3) *Vide* debate, 13 March, 1832, on the French landing at Ancona.

[* See for the general discussion of the right of interference in its connexion with the independence of States, *ante*, Book III. chap. I. p. 96.]

Civil wars.

The same dilemma that has been exemplified by the right of intervention, is also applicable to the right of resistance to tyranny by civil war, which right it is also difficult to limit by any general rules that are not either obvious, or too indefinite to afford any practical guide for conduct. It is admitted by Grotius that some occasions may occur that justify resistance to the sovereign, though he limits this right to the most extreme cases. (1) And, on the other hand, those who advocate, in the fullest extent, the right of forcible resistance, must admit that nothing but an extreme case can justify having recourse to such a social convulsion. The time has gone by when the doctrine of patrimonial kingdoms was in vogue, as though a country and its inhabitants were a property that could be transmitted from monarch to monarch, like an estate with the live stock upon it; no one now thinks of justifying the slavish sophistry of Hobbes; (2)* and the abstract right of resistance is

(1) De Jure, lib. I, c. iv.

(2) Hobbes not only asserts passive obedience, but even denies that private property is, *by right*, inviolable by a sovereign. He says, "Quoniam autem, ut supra ostensum est, ante constitutionem civitatis omnia omnium sunt, neque est quod quis ita suum esse dicat, quod non alius quilibet idem eodem jure vindicet pro suo, (nbi enim omnia communia sunt, nihil cuiquam proprium esse potest), sequitur proprietatem initium sumpsisse cum ipsis civitatibus, atque esse id cuique proprium quod sibi retinere potest per leges et potentiam totius civitatis, hoc

est, per eum cui summum imperium delatum est. Ex quo intelligitur singulos cives suum sibi proprium habere, in quod nemo concivium suorum jus habet, quia iisdem legibus tenentur; non autem proprium habere quicquam, in quod non habeat jus ille qui habet imperium summum, cujus mandata sunt ipsæ leges, cujus voluntate voluntas singulorum continetur, et qui à singulis constituitur iudex supremus. Quamquam autem multa sint, quæ civitas civibus permittit, ideoque aliquando contra habentem summum imperium lege agi possit, actio tamen ea, non est juris ci-

[* See Mr. Austin's masterly defence of Hobbes in the long note affixed to his sixth lecture. The language quoted from the "De Cive" is not an apology for a tyranny, but a scientific exposition of sovereignty.—ED.]

everywhere allowed; but when the occasion occurs that will justify the exercise of that right, is what cannot be settled by any formula, or reduced to any distinct proposition.*

A nation may sometimes have a right to make war, when, nevertheless, from the circumstances of the case, a government would not be justified in having recourse to hostilities. The probability of success must ever form a chief ingredient in determining the resolutions of a wise statesman. Also the proportion between the evil to be sustained by acquiescence, and the evil to be encountered in obtaining redress, must be considered. But, although such contingencies must be duly weighed, and although in public, as in private morality, prudence is ever one of the most important duties, yet no position can be more false than that it is by mere calculations of

Prudence to be consulted, but not unduly.

vilis, sed æquitatis naturalis; neque agitur de eo quod jure possit is, qui summum imperium habet, sed de eo quod voluit; ideoque ipse erit judex, tanquam si, cognitâ æquitate, non posset iniquè judicare."—De Civē, c. VI. § XV. Mr. Ward has discussed the question of resistance in his recent work on the Revolution of 1688, but, with my great respect for Mr. Ward's writings, I am obliged to regret that in his wish to op-

pose the tendency to thoughtless changes, he has, in my opinion, given too contracted a view of the occasions when the inestimable importance of free institutions justifies recourse to resistance to established authority; and when the oppressive exercise of power may justify a *revolution*, as defined by Lord Stanley, "a change in the constitution effected by unconstitutional means."

[* The recent civil war in America may be said to have introduced a new problem into a region already occupied to the full with casuistical perplexities. Owing to the special circumstances of the Federal Union, both the theoretical right of secession and the theoretical right of compulsion were, to a certain extent, novel, and defied any offhand analogical treatment. It demanded an appreciation of the whole position in relation to the actual and prospective policy of the slave-holding States, and a historical review of the recent conduct and attitude of those States towards the Union, in order to conciliate the sympathies of Europe for the politicians of the North.—ED.]

chances, or mere suggestions of profit and loss, that a war should be determined. The importance of example, the knowledge that acquiescence in a slight injury might invite greater injury, and the necessity of maintaining national spirit as the only secure means of perpetuating national existence, these reasons make resistance to aggression, and the maintenance of the national honour; among the strictest of public duties, and not only justify, but demand, the incurring great risk for their preservation. But such considerations belong more correctly to Policy than to Law: nor does the Law of Nations afford any satisfactory general principles for declaring, *a priori*, when expediency will coincide with right in justifying recourse to hostilities.

Importance of
fundamental
principles in
morals.

But although it may be, at the present day, a profitless expenditure of time to arrange abstract propositions on political questions, yet we must not condemn as useless the labours of preceding writers who pursued such investigations. It is the present state of political knowledge that renders such inquiries unnecessary; but it is to the arguments of preceding writers that we owe the advance that enables us to dispense with such discussions. Many political truths are now regarded as axioms, which were formerly the subjects of bitter controversy. No Locke would now be called upon to refute the fallacies regarding the divine right of kings, because no Filmer could now be found to assert such doctrines: but it is to Locke that we owe many of the opinions which are now on every one's lips as indisputable; and his dogmas are now regarded as truisms which were formerly with difficulty admitted as truths. We now stand upon ground that has been permanently reclaimed from error, but we must not forget to whom we are indebted for our security. And though, in this chapter, I have deprecated giving much time to the consideration of abstract propositions in politics, yet no one can be more sensible

of the great value of correct fundamental principles in morals. I have deprecated such discussions, because I think that the great principles of morality are now ascertained, and that individual cases have generally to be settled by their special circumstances; but it must still always be with reference to the great principles of morality, that individual cases are determined; the great principles of justice must ever form the test and standard of political action, and nothing is better adapted to the detection of fallacy, and the maintenance of a right course, in national morality, than the admirable maxim that has been given for the test of rectitude in private life, "frequently recur to first principles."

It is to the general advance of enlightenment and morality that I look for a decrease in the frequency of wars. I expect from these influences the double action of the absence of such injuries and aggressions as demand war, and an abhorrence of having recourse to the immense evils of war for any objects but those of national defence or redress.

Effect of general enlightenment in preventing war.

The influence of popular control, it may reasonably be hoped, will have a salutary effect, among representative governments, in diminishing the frequency of wars. We could not, in this country, have a war continued merely to make a minister necessary, (1) nor could the frivolous pretexts of offensive medals and pictures be now alleged in a declaration, as justifying hostilities, as was the case in the Dutch war of 1672. (2) "Among Christian kingdoms," says Voltaire, speaking of the wars of Louis XIV.,

Influence of popular institutions.

(1) "Il est difficile de dire précisément pourquoi l'on faisait cette guerre; on ne demandait rien à l'Espagne, pas même la Navarre, qui aurait dû être le patrimoine des rois de France: on se battait depuis 1635, par-

ce que le Cardinal de Richelieu l'avoit voulu, et il est à croire qu'il l'avoit voulu pour se rendre nécessaire."—Voltaire, *Siècle de Louis XIV.* tom. I. ch. III.

(2) Burnet, I. 305.

"the people at large have hardly ever any interest in the wars of their sovereigns. Mercenary armies, levied at the command of a minister, and led by a general who blindly obeys that minister, make several ruinous campaigns, without the kings, in whose name they fight, having the hope, or even the intention, of seizing upon the whole of each other's patrimony. The people of a conquering State never participate in the spoils of a vanquished State: they pay for every thing; they suffer equally during the success or the disasters of war: and peace is almost as necessary to them after the greatest victory, as when the enemy has taken their frontier fortresses." (1) Popular control will prevent the recurrence of such wars of ambition. I am aware that many popular governments have been as much addicted to wars of ambitious aggression as any despotic governments; but this has been in cases where power was held by the populace rather than by the people, and can form no ground for fearing similar results where the constituent body is advanced in civilization, and accustomed to a thoughtful exercise of the social duties. I look for a check upon thoughtless, or wrongful, hostilities, chiefly to the advance of education among constituents and representatives, and to the efforts of those who are endeavouring to make the advance of morality and religion go hand in hand with the progress of general enlightenment.

[The experience of the years which have elapsed since these words were written has shewn that if education and civilization have generated influences favourable to peace, they have also (it must be hoped only for the time) opened up unexpected occasions of the most gigantic and embittered wars. For the moment, at the least, the progress of education, of mechanical improvements, of facilities of locomotion, and of race sympathies

(1) *Siècle de Louis XIV. tom. I. ch. 6.*

have told rather in favour of those strong governments which have been enlightened enough to turn these forces most astutely to account for their own purposes, and yet have failed to be enlightened enough to count war too dear a price to pay for what they sought. The increased rapidity and wide destructiveness of modern wars—due to the constitution of modern armies, to the use of steam-locomotion, and to improvements in artillery—while tending to make war and the assiduous preparation for it more expensive, tend, likewise, to facilitate resort to it on the slightest provocation, if the temptation be sufficiently strong. On the other hand, it cannot be denied that there are many influences of daily increasing strength which are steadily tending in favour of a general pacific policy. In addition to the educational and popular influences alluded to in the text, the commercial habits and growing intercourse of the populations of modern States, and the publicity of diplomatic negotiations—owing, partly, to the existence of the public press and, partly, to the diffusion of parliamentary institutions—tend to render war an object of increasing popular concern and general abomination. Such a sentiment must not only conduce to the prevention of war by the popular pressure exerted on the governments of would-be Belligerents, but must also contribute greatly to reinforce the energies of Neutrals in confining wars to the narrowest possible area and in bringing them to the earliest possible close.—ED.]

CHAPTER II.

OF RETORSION—EMBARGO—REPRISALS—AND
PRIVATEERS.

Retorsion.

BESIDES the sad alternative of obtaining redress by war, there are various methods, of a forcible nature, by which a State may obtain justice to its injured subjects, and which do not interrupt the relations of amity. One of these is called *Retorsion*, a name used for the employment of the same hard treatment of the subjects of a State, as this State has used towards the subjects of another State, by whose government retaliation is resorted to as a means of obtaining the removal of the obnoxious measures. (1) *

(1) For further notice on Retorsion, see Vattel, liv. II. ch. liv. VIII. ch. II. § 254. Klüber, Droit des Gens., Sect. II. ch. II. xviii. § 841. De Martens, Précis, § 234.

[* *Retorsion* is said to be the characteristic remedy against *jus iniquum*, that is, want of comity or fairness in the laws of one State as affecting the citizens of another.

Reprisals is the remedy against *injustitia*. See Heffter, § 110.

The following is the passage from Vattel cited in the note (1):—
“When a sovereign is not satisfied with the manner in which his subjects are treated by the laws and customs of another nation, he is at liberty to declare that he will treat the subjects of that nation in the same manner as his are treated. This is what is called *Retorsion*. There is nothing in this but what is conformable to justice and sound policy. Thus the King of Poland, Elector of Saxony, enforces the law of escheatage only against the subjects of those princes who make the Saxons liable to it. This retorsion may also take place with respect to certain regulations, of which we have no right to complain, and which we are even obliged to approve, though it is proper to guard against their effect by imitating them.”

The right of *Retorsion* is claimed, and the exercise of it, in a particular case, regulated by the 37th clause of *Magna Charta*: “All merchants, unless they have been publicly prohibited, shall have safety

Embargo is a term used for the sequestration, either *Embargo*. temporary or permanent, of the property of individuals for the purposes of a government. Embargoes have been often imposed by governments with no hostile purpose, but merely to obtain some immediate object; such as by an embargo on shipping to obtain vessels for the transport of troops, the owners being reimbursed for this forced service; and this exercise of authority was formerly so frequent as to have occasioned the usual insertion, in treaties of commerce, of an article declaring that the subjects of neither power shall be liable to this, often injurious, treatment. But the species of embargo we are now considering is when for injuries received, or anticipated, from another power, an embargo is laid upon the property of the subjects of that State found in the territory of the aggrieved country. If the injury be removed or compensated, upon the repeal of the embargo intercourse is restored on its usual footing; if

and security in going out of England and in coming into England, and in staying in and in travelling through England, as well by land as by water, to buy and sell, without any unjust exactions, according to ancient and right customs, excepting in the time of war, and if they be of a country at war against us; and if such are found in our land at the beginning of a war, they shall be apprehended, without injury of their bodies and goods, until it be known to us, or to our chief justiciary, how the merchants of our country are treated who are found in the country at war with us, and if ours be in safety there, the others shall be in safety in our land." The proceedings here contemplated might be either by way of *Retorsion* or *Reprisals* according as the treatment of English merchants by the enemy was merely oppressive or transparently unjust. Of course the line cannot be always clearly drawn between the one kind of treatment and the other, nor therefore between the two sorts of appropriate remedies.

Retorsion has been sometimes distinguished into *Retorsio juris* and *Retorsio facti*. *Retorsio juris* is the sort of retaliation which is inflicted by making a change in the law to the disadvantage of the citizens of the offending State. *Retorsio facti* would seem to imply strictly nothing more than an act or course of action resorted to by the executive government. *Retorsio facti* is, in fact, a species of *Reprisals*.]

justice be denied, the means of redress are in our own hands, either wholly or partly, by confiscating the goods and obtaining indemnification from the proceeds.*

[* *Embargo* (derived from the Spanish *embargar*, to hinder or detain) has been distinguished into *civil* and *hostile*; and *civil embargo* again into that which a State exercises towards its own subjects or the subjects of other States with which it is on friendly terms, and that which it exercises in order to bring pressure to bear on a State with which it has a difference and as a possible precursor of war. An instance of the *civil embargo* of the first kind is supplied by the conduct of the United States in 1807 and 1808 (see the complaints presented by citizens of Boston and Philadelphia, and President Jefferson's answer to them in the Annual Register, vol. xlix.). The right known as the "*Droit d'Angarie*" (from the word *ἄγγελος*, a Persian word appearing in the New Testament in the form *ἄγγελος*—"I press as a messenger") is, in fact, a civil embargo of the first kind. It is defined by Sir R. Phillimore (Part IX. ch. II.) to be "an act of the State by which foreign as well as private domestic vessels, which happen to be within the jurisdiction of the State, are seized upon and compelled to transport soldiers, ammunition, or other instruments of war; in other words, to become parties against their will to carrying on direct hostilities against a power with whom they are at peace." Heffter extends the right to neutral merchandise, magazines, grain and the like, either within the territory of the State or arrested on the open sea. A full account of this right,—if it be any other than the questionable sort of right which circumstances of special necessity occasionally call into ephemeral existence,—will be found in Hautefeuille's "*Rights and Duties of Neutral Nations*," tit. 14, pp. 433–452. A recent instance of the exercise of this so-called right was supplied in the Franco-German War of 1870, when the German general, in command at Rouen, seized some English vessels and sunk them in the Seine at Duclair in order to prevent French gunboats from running up the river and cutting off the communication between the German corps on the two banks. Count Bismarck alleged that the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usage. The English Government in reply confined itself to insisting on compensation to the persons whose property had been destroyed. (See Hall's "*Rights and Duties of Neutrals*," p. 188.)

The meaning of a *hostile embargo* and its relation to a subsequent condition of peace or of war, as the case may be, can be gathered from the following extract of Sir W. Scott's judgment in the case of the "*Boedes Lust*" (5th Robinson, p. 246): "The seizure was at first equivocal, and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. That would have been the retroactive effect of that course

Reprisals are a seizure of property belonging to the subjects of a State that has inflicted unredressed grievances on the subjects of another State.* Some-

of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure. It is declared to be no embargo; it is no longer an equivocal act subject to two interpretations; there is a declaration of the *animus* by which it was done, that it was done *hostili animo*, and is to be considered as a hostile measure *ab initio* * * * It was a provisional seizure declared to be hostile by subsequent events acting in a reflex manner upon all the property then seized.”]

[* The proper definition of the term *Reprisals* would seem to make its signification much larger than that given in the text. It would seem to cover all the methods by which a State, on conceiving itself to be injured, resorts to what the Germans call “self-help,” and takes the law into its own hands either by the action of the executive government or by the means of licences granted to private citizens. Wheaton’s definition is as follows:—“The mode of making reprisals seems to extend to every species of forcible means for procuring redress, short of actual war, and, of course, to include all the others above enumerated (such as *embargo* and *retorsion* in its various kinds). Reprisals are *negative*, when a State refuses to fulfil a perfect obligation which it has contracted, or to permit another nation to enjoy a right which it claims. They are *positive* where they consist in seizing the persons and effects belonging to the other nations, in order to obtain satisfaction.” (Eighth edition by Dana, p. 369.) See also Heffter, § 111. One sort of reprisals not considered in the text, but to which recent wars have drawn special attention,—and which formed a special topic in the programme discussed by the late Conference at Brussels on the Rules of Military Warfare in 1874,—is the species of retaliation which the commander-in-chief of an army exercises against an enemy or the private citizens in an enemy’s territory in case of an infraction by them of the laws of war. In this sense of the term the consideration of them does not strictly belong to the present place, but it may be entered upon conveniently in order to prevent the necessity of recurring to it again. It was held, indeed, at the Conference, that occasions on which reprisals of a severe character had been executed were of far too recent a date to allow the practice to be discussed calmly. The passage relative to reprisals in the original project ran as follows: § 69. “Reprisals are admissible in extreme cases only, due regard being paid, as far as shall be possible, to the laws of humanity, when it shall have been unquestionably proved that the laws and customs of war have been violated by the enemy, and that they have had recourse to measures

times not only goods, but individuals, have been made the subjects of reprisals; as when, in 1740, the Empress of Russia arrested a Baron Stackelberg, who was born her subject, but was an officer in the Prussian service, and the King of Prussia seized two Russians till Stackelberg was liberated. (1) Grotius quotes from Homer, and from the Roman history of the time of the Tarquins, instances where redress by reprisals was resorted to in ancient times, (2) the retaliation of robbery for robbery being in fact a method of obtaining satisfaction that was at once obvious, and congenial to the rude habits of the period. And in the middle ages there were frequently instances in which individuals took the law into their own hands, and seized upon the property of foreigners, to indemnify themselves for injuries sustained from other members of the same State. (3) At the present day, such unauthorized violence on the high seas would be considered, and be

- (1) Moser, Versuch, VIII. 504. (3) De Martens, Précis, liv.
 (2) De Jure, lib. III. c. II. § 5. VIII. ch. II. § 260.

condemned by the Law of Nations. § 70. The selection of the means and extent of reprisals should be proportionate to the degree of the infraction of the law committed by the enemy. Reprisals that are disproportionately severe are contrary to the rules of international law. § 71. Reprisals shall be allowed only on the authority of the commander-in-chief, who shall likewise determine the degree of their severity and their duration." On the Conference feeling itself compelled to decline to discuss the subject, the first Russian delegate, the Baron A. Jomini, said, "I regret that the uncertainty of silence is to prevail with respect to one of the most bitter necessities of war. If the practice could be suppressed by this reticence, I could but approve of this course. But if it is still to exist this reticence may, it is to be feared, remove any limits to its exercise. Nevertheless, I believe that the mere mention in the protocol that the committee after having endeavoured to regulate, to soften, and to restrain reprisals, has shrunk from the task before the general repugnance felt with regard to the subject, will have a most serious moral bearing. It will, perhaps, be the best limitation we have been able to affix to the practice, and especially to the use which may be made of it in the futuro." *Supplement to the London Gazette*, Oct. 23, 1874.—ED.]

punished, as piracy. The word reprisal has, in its derivative sense, reference to every sort of retaliation, but at the present day the term is almost exclusively employed for the issuing of *letters of marque*, commissioning the owners of private vessels to seize upon the ships and cargoes of the subjects of an offending State, for the indemnification of their private injuries.

To justify recourse to reprisals, it is indispensably necessary that there should be a denial, or highly injurious delay, of redress for received injuries. This is emphatically insisted on by all the great authorities on the Law of Nations. It is the clear dictate of reason that such violent measures, involving great individual calamity, and risking the expenditure of human life, cannot be sanctioned by anything short of necessity, arising from the failure of friendly negotiations. The practice of States uniformly coincides with this dictate of the Law of Nature. In the words of Sir Leoline Jenkins, "reprisals will not lie when there is neither denial of justice nor a delay of it amounting to denial." (1) Grotius says, that the right to use reprisals exists "*ubi jus denegatur*," and subsequently adds, that this right may not be exercised when the judicature of the offending foreign country will afford redress,—"*exteri habent jus cogendi, sed quo uti non liceat quamdiu per judicium suum possint obtinere*." (2) Bynkershoek says, "*ne repressaliæ concedantur, nisi palam denegatâ justitiâ*." (3) And Vattel says, that it is after an injured party "has ineffectually demanded justice, or at least that he has every reason to think that it would be in vain for him to demand it; then alone does it become lawful for him

Reprisals only allowable when justice is denied or delayed.

(1) Opinions of eminent lawyers on various points of English jurisprudence, edited by Chalmers, vol. II. 324.

(2) De Jure, lib. III. c. II. § 4, 5.

(3) Quæst. Jur. Pub. lib. I. c. XXIV.

to take the matter into his own hands, and do himself justice." (1)

This restriction enforced in many treaties.

This line of conduct has also been insisted on in a great number of treaties, especially those made during the middle ages, when the frequency of outrage and piracy occasioned constant resort to reprisals. One curious example regarding reprisals occurring in 1326 has been already mentioned. (2) In the treaty between the Duke of Lorraine and the Count of Flanders in 1339, it was agreed that reprisals should never be resorted to, unless justice had first been sought from the constituted authorities. (3) In the treaty between Henry IV. and the Duke of Burgundy in 1406, it was agreed that no letters of marque, or other reprisals, should be allowed for any acts previous to that treaty. (4) The same stipulation was made in the treaty between Edward IV. and the Hanse Towns in 1474. (5) In the treaty of 1410, between our Henry IV. and the Grand Master of the Teutonic order, it was stipulated that no seizure of property belonging to the subjects of either party shall be made for purposes of indemnification until application has been made to the respective governments for the amount of the injury; but that, if six months elapse without restitution, it shall then be permitted to either party to seize upon the goods of the other's subjects, to the amount of the injury sustained. (6) That such stipulations, regarding the exercise of reprisals, were rendered necessary by the manner in which private retaliation was resorted to in those lawless times, is shewn by its having been even thought necessary to

(1) *Droit des Gens*, liv. II. ch. xviii. § 343. See further, *De Martens*, Précis, liv. VIII. ch. II. and Moser, *Versuch*, VIII. B. XVII. c. 4, § 5.

(2) *Ante*, p. 18.

(3) *Dumont*, *Corps Dipl.* I. II. 185.

(4) *Id.* II. i. 305.

(5) *Id.* III. i. 469.

(6) *Id.* II. i. 329.

insert in treaties, that neither party would permit these private hostilities among their respective subjects: as in the treaty between Edward IV. and the King of Castile in 1467, where it is stipulated that neither party shall allow their subjects to make war on the other; (1) and in the treaty of 1470 between Henry VI. and Louis XI. it is stipulated that neither monarch, nor the subjects of either, should exercise hostilities for their own quarrels, or for the quarrels of others. (2) Similar stipulations are found in other treaties before me of the same period. In the sixteenth century, the treaties of commerce continually contain the stipulation that no reprisals are to take place, unless for denial or delay of justice. See for instance the treaties between England and Spain in 1515, (3) between France and England in 1525, (4) and between France and Spain in 1559. (5) In a treaty between England and France in 1510, it was agreed that neither party should grant letters of marque, except against the principal delinquents or their goods, and for manifest delay or denial of justice; (6) this was renewed in the treaties between the same powers in 1514 and 1515; (7) and in their treaty of 1632 it was agreed that reprisals should never be issued unless for denial, or excessive delay of justice, and never to take effect upon goods and ships in harbour, except those belonging to the offender himself. (8) In the treaty between the States General and Morocco in 1610, it is agreed that no reprisals shall be granted on either side, but that prompt justice shall be administered; (9) and a similar stipulation occurs in the treaty between England and Denmark in 1621. (10) But these are exceptions; most treaties allow reprisals

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| (1) Dumont, Corps Dipl. III. | (6) <i>Id.</i> IV. i. 126. |
| 1. 589. | (7) <i>Id.</i> 184, 205. |
| (2) <i>Id.</i> 601. | (8) <i>Id.</i> VI. i. 33. |
| (3) <i>Id.</i> IV. i. 216. | (9) <i>Id.</i> V. ii. 158. |
| (4) <i>Id.</i> 436. | (10) <i>Id.</i> 393. |
| (5) <i>Id.</i> V. i. 35. | |

to be made if there be denial or delay of justice ; and in the treaties from the middle of the seventeenth century, it was frequently stipulated that reprisals should be allowed if justice were not done within some definite time, as three, four, or six months : of these several instances lie before me, but I refrain from giving further citations. (1)

Reprisals cannot be allowed to a third party.

Reprisals constitute a method whereby a nation obtains justice for its injured subjects, when such justice cannot be obtained by friendly methods. They are a mode of obtaining satisfaction that creates fewer evils than war, and a nation should therefore exercise this right, if it will suffice to the object to be obtained, rather than proceed to the greater calamity of general hostilities. But though a nation has, both by the Law of Nature and by the usage of nations, and frequently also by express convention, a right to resort to reprisals if justice be denied to its subjects, yet no nation has a right to exercise reprisals for the benefit of any but its own subjects. Reprisals are a method of obtaining satisfaction for grievances, and no nation can claim compensation when it has received no injury. Nor can it possibly be admitted that one nation should erect itself into a judge of other nations, and, by taking from one party to give to another, exercise rights that belong only to jurisdiction and sovereignty. Reprisals can only be issued on the denial or delay of justice, and are exclusively a means of obtaining compensation for the injured subjects of the State that grants them. Vattel insists emphatically that a nation cannot grant reprisals except in favour of its own subjects, and he adduces a case in

(1) Those who desire to see such will find them in Dumont, VI. II. 76, 121, 347, and VII. I. 38, 42, and VII. II. 387, 401, &c.,

&c., and for more modern instances, De Martens, Recueil, IV. 157, 680, &c.

which this was recognized by our own country. (1) In 1662, England granted reprisals against the United Provinces, in favour of the knights of Malta; but the States General asserted that, by the Law of Nations, reprisals could only be granted by a State for the indemnification of its own subjects, and not for an affair in which it had no concern; and this was subsequently admitted by England. It must, however, be remarked that Bynkershoek, in mentioning that this had been done, says, “*dubito an recte; si enim recipias repressalias pro subditis, esse non videtur cur pro exteris neget; nam justæ sunt, vel injustæ; si injustæ, et subditis per injuriam concedantur, si justæ, non possunt sine injuriâ perigrinis negari, in ratione juris enim Tros Tyriusve fuat, nullo discrimine habetur.*” (2) But this position is fallacious, because no nation can have a jurisdiction over other nations, nor be in a position to declare whether the conduct of other nations is just or unjust: a municipal tribunal pronounces judgment without considering who are the applicants submitted to its jurisdiction; but no State is such a tribunal for other States, each being independent and in a state of nature with regard to other States. (3)

In a great number of treaties it has been agreed, that if the subjects of either party take letters of marque from the enemies of the other, they shall be considered and punished as *pirates*. This was the case in the treaty between France and the United Provinces in 1662; (4) such conduct was declared unlawful in the treaty between England and the United Provinces in

Subjects of neutral States taking commissions from belligerents often declared pirates.

(1) Droit des Gens. liv. II. ch. XVIII. § 348. De Martens in his Précis, liv. VIII. ch. II. § 261.

(2) De Foro Legatorum, cap. XXII. (4) Dumont, Corps Dipl. VI. II. 413.

(3) See further the opinion of

1667; (1) and in the treaty between England and Denmark in 1669; (2) it is declared piracy by the treaty of Nimeguen in 1678; (3) and by the treaty at Ryswick between France and the United Provinces in 1697; (4) in the treaty between England and France at Utrecht, in 1713, it is forbidden, "sous les plus grandes peines qui puissent être ordonnées;" (5) and in the treaty of the same time between France and the United Provinces it is declared piracy. (6) It is declared piracy in the treaty between the United States and France in 1778; (7) in that between the United States and the Netherlands in 1782; (8) and in that between the United States and Sweden in 1783; (9) it is forbidden under the greatest penalties in the treaty between Great Britain and France in 1786; (10) and is again declared piracy in the treaties between Prussia and the United States in 1785 and 1799; (11) between Denmark and Genoa in 1782; (12) between Great Britain and the United States in 1795; (13) between the United States and Spain in 1795; (14) between the United States and Central America in 1825, (15) and between the United States and Columbia in 1824. (16)

But men acting under a regular commission ought not to be treated as pirates, except from special convention.

But although there are so many treaties among the chief maritime powers, declaring that the *subjects of the contracting parties* shall be treated as pirates if they take letters of marque from the enemies of the other, yet no power would be justified in having recourse to that treatment where there is no special treaty stipu-

- (1) Dumont, Corps Dipl. VII.
I. 46.
- (2) *Id.* 129.
- (3) *Id.* 358.
- (4) *Id.* VII. II. 387.
- (5) *Id.* VII. I. 348.
- (6) *Id.* 378.
- (7) De Martens, Rec. II. 597.
- (8) *Id.* III. 447.

- (9) *Id.* III. 576.
- (10) *Id.* IV. 157.
- (11) *Id.* IV. 45, and VI. 684.
- (12) *Id.* 448.
- (13) *Id.* V. 678.
- (14) *Id.* VI. 154.
- (15) *Id.* Supp. X. 837.
- (16) *Id.* 1002.

lating that degree of punishment. No State would be justified, except by special convention, in treating as pirates men who are fighting under a regular commission. This opinion I find supported by De Martens, in his excellent essay on privateers. (1) Still, as the duties of neutrality require a State to abstain from allowing its subjects to take any part in a contest between belligerents, it is incumbent on governments to prohibit their subjects from such interference, which is clearly inconsistent with neutrality, and many examples lie before me in which this has been done by neutral States. James I. proclaimed that any ship, having more English than foreign sailors on board, committing any violence against an ally, should be treated as a pirate. (2) In the *Ordonnance de la Marine* of Louis XIV., French subjects are forbidden to take letters of marque from foreign princes, unless by their own sovereign's permission, under penalty of being treated as pirates. (3) But by the Swedish ordinance of 1715, art. I., commissions to act as privateers are offered not only to Swedish subjects, "*mais aussi à ceux des puissances étrangères*;" (4) subsequently, however, when Sweden was neutral, such interference was forbidden by the ordinance of 1784. (5) During the American war the Grand Duke of Tuscany, in 1778, forbade his subjects to use such interference under a penalty of 3000 scudi; (6) the Pope did the same, in 1779, under a penalty of 2000 scudi. (7) It is true that the French Directory, in 1798, ordered that all neutral sailors found in the British fleet should be considered as pirates, (8) and this would probably have

(1) De Martens, *Essai sur les armateurs*, translated by T. H. Horne, 1801, I. c. 13.

(2) Albericus Gentilis, *Hispan. Advoc. lib. I. c. x.*

(3) Valin, *Ord. de la Marine*, liv. III. tit. IX. art. III.

(4) Robinson's *Collectanea Maritima*, p. 167.

(5) De Martens, *Rec. Supp. III.* 551.

(6) *Id. Rec. III.* 29.

(7) *Id.* 55, 71, 77.

(8) *Id.* V. 399.

extended to ships bearing letters of marque ; but this must be looked upon, not as a precedent of the Law of Nations, but merely as an instance of the ferocious warfare of its promulgators. If a neutral State were to encourage, or permit, its subjects to aid a belligerent by equipping ships and taking commissions as privateers, such conduct must provoke remonstrance, and might justify hostilities if persevered in ; but, in my opinion, no State can be justified, except by special treaty, in executing as pirates men who have acted under a regular commission.

Commissions
indispensable
in all cases of
reprisals.

Formerly reprisals were very frequently exercised without any commission ; De Martens says, that up to the fifteenth century commissions were by no means regularly given to privateers making reprisals. (1) A curious instance occurred in 1292 : an English and a Norman sailor quarrelled at Bayonne, and in the scuffle the latter was killed : the mariners of the Norman ship complained to their king, Philip le Bel, who, without inquiring into the fact, or demanding redress, told them to take their own revenge and give him no further trouble. Upon this the Normans seized an English ship in the channel, and hanged some of the crew at the yard-arm, and some dogs at the same time. In retaliation the mariners of the cinque-ports, without making any complaint to our king, committed similar barbarities upon French vessels : the sea became a scene of constant piracy : the English made private associations with the Irish and Dutch, and the French with the Flemish and Genoese. Two hundred Norman vessels, sailing to the south, seized all the English vessels they met with, hanged the seamen, and seized the goods. The English merchants fitted out a fleet of sixty sail, better appointed than the other fleet, and in

(1) Essay on Privateers, ch. I. § 5, 6.

an obstinate battle sunk or took the greater part of the French fleet; no quarter was given, and it is said that fifteen thousand French were massacred on the occasion. The affair was then taken up by the two governments, and merged in the war regarding Guienne. (1) As civilization advanced, private unauthorized reprisals ceased. When, in 1569, the Prince of Orange issued letters of marque to the gentlemen and others who became so notorious as the "gueux de mer," many of them were punished as pirates; "not so much," says De Martens, "on account of their excesses, as because it was not thought that the Prince of Orange had power to grant such letters of marque." (2) At the present day, as it is hardly necessary to observe, any vessel exercising hostilities without a commission, in time of peace, would be treated as a pirate.*

Reprisals are either *special* or *general*. Special Reprisals *special* or *general* reprisals are such as we have been now considering, and consist of the indemnification, by forcible means, of injuries done to certain individual subjects of one State by the subjects of another State: special reprisals do not at all interrupt the relations of amity; they are only a means of obtaining redress where justice is refused, and as soon as such redress is obtained for the individuals injured, the right to exercise reprisals has ceased, and every thing is restored to its usual footing. This species of reprisals was formerly in frequent use; but is now seldom resorted to, owing to the diminution

(1) See Hume, vol. II. ch. 13, (2) Essay on Privateers, ch. I. and Ward's Enquiry, &c., I. p. § 7.
295.

[* In the important case of the *Le Louis* (Dodson's Adm. Rep. vol. II. p. 244), Sir W. Scott says:—"Another exploded practice was that of princes granting private letters of marque against the subjects of powers in amity by whom they had been injured without being able to obtain redress from the sovereign or tribunals of the country."—ED.]

of the violent outrages common in ruder times, and to the greater efficiency of tribunals, and the readiness of governments to promote justice to foreigners as well as to natives. *General* reprisals are only used in time of war, and consist in authorizing any individuals whatever, whether suffering from private grievances from the hostile power or not, to act against the subjects of the opposed State. At the time of the "Continental System," Jefferson proposed to retaliate for the injuries sustained by American commerce, by general letters of marque and reprisal, "because, on a repeal of their edicts by the belligerents, a revocation of the letters of marque would restore peace without the delay, difficulties and ceremonies of a treaty." (1) But this would have been at variance with the customary law of Europe, which is stated by Vattel in the words of De Witt, "I do not see any difference between general reprisals and open war." (2)

Privateers.

Ships commissioned by letters of marque, and exercising general reprisals, are commonly termed Privateers. They constitute a species of force which has been resorted to in almost all wars; and a great number of treaties regulate the granting such commissions; especially stipulating that persons who take such letters of marque shall find large security to their government; so as to form a fund that may be applied for purposes of indemnification, in case neutrals should be injured by the lawless aggression of such privateers. The most extraordinary encouragement ever given to this species of force, was by Louis XIV., who, by an ordinance in 1688, lent his ships of war to private individuals, in a state of complete preparation for sea, with all necessary munitions, rigging and stores. The individuals who used these vessels as privateers were not

(1) Jefferson's Correspondence, vol. IV. p. 119.

(2) Vattel, *Droit des Gens*, liv. II. ch. XVIII. § 345, note.

responsible if the ship were lost, and were to have the whole profits of the prizes made, only paying for the wages and provisions of the men, and replacing the stores consumed. (1) Ships of war had been lent by Louis XIV. as privateers, under less advantageous conditions, in 1674. This was a favourite species of force at that period; and Voltaire says that it was supposed, though not proved, that part of the great wealth of Mazarin was gained by his sharing in the profits of privateers. (2) When the United States, at the conclusion of the American war, sent ministers to Europe to negotiate treaties, they endeavoured, at the suggestion of Franklin, (3) to obtain the general insertion of an article forbidding the use of privateers. This was done in their treaty with Prussia in 1785, art. XXIII.; (4) but it was attended with no general results, and this article was not renewed in their Prussian treaty of 1799. The miseries of war might be lessened if the use of privateers were discontinued: but, as a chief end of maritime warfare is the annoyance of the enemy by the destruction of his commerce, privateers certainly exercise a direct influence on the issue of a war, and are often a very useful species of force. They increase the naval force of a State, by causing vessels to be equipped, from private cupidity, which a minister might not be able to obtain by general taxation without much difficulty; and though the custom of privateering may have many objections, yet one State will not be able to forego the use of this species of force, if it should be resorted to by its hostile antagonist.*

(1) Valin, tom. II. pp. 226, 227.

(3) Jefferson's Correspondence, IV. 450.

(2) Sièc. de Louis XIV. tom. I. p. 106.

(4) De Martens, Recueil, IV. 47.

[* The first clause of the celebrated Declaration annexed to the treaty of Paris of 1856 (of which a fuller

[account will be given in a later chapter), is "*La course est et demeure abolie.*" Thus privateering may be said to be finally abolished as between the signatories to that treaty—that is, Turkey, Russia, Austria, Prussia, Italy, France and England,—and the States which have since given in their adhesion to it. The United States refused to become a party to the Declaration, on the grounds stated by the Secretary of State, Mr. Marcy, in his note of July 28th, 1856, addressed to M. de Rediges, minister of France at Washington, to the effect that the relinquishment of privateering would be a gain to nations which kept on foot a large naval force, but not to the United States, where a powerful navy is not maintained. He consented, however, to agree to an arrangement, by which the private property of the subjects of a belligerent power should be exempted from seizure by public armed vessels of the enemy, except it be "*contraband of war;*" and that with this the United States would consent to the placing of privateering under the ban of the Law of Nations.

The Declaration of the treaty of Paris came under the consideration of the House of Commons on April 13th, 1875, on a motion brought forward by Mr. B. Cochrane, in favour of England taking an opportunity to withdraw from the obligations the Declaration entailed upon her.

In the course of the debate, Mr. Bourke, who represented in the House the government department of foreign affairs, said: "He could not understand how hon. gentlemen could justify privateering in a point of view which had been called by almost every person the curse of commerce. Even those by whom it had been upheld as the last resource of war, had admitted that it was most desirable it should, if possible, be got rid of. Of one thing he was quite sure, and that was, that this country would gain more by its abolition than any other, if we could only get the rest of the world to act in that direction. No nation was

[“ more open to privateers, in proportion to the strength of our commercial marine, compared with that of a belligerent.” Professor Sir W. Harcourt, in the course of the same debate, said: “ We gained (by the Declaration) the abolition of privateering, and he agreed with the under Secretary of State that to a great maritime power that was an infinite gain. It was more—it was a gain to the civilized world. According to the French name for the word, a privateer was a *corsair*, and that thoroughly expressed the meaning. Privateers were not bound by the sentiments which belonged to officers in the naval service, or by the discipline which was to be found among regular soldiers. His hon. friend compared them to volunteers, but they were more like *Franc-Tireurs*, and volunteers did not go out for gain as they did. That was not the spirit by which they were actuated.” This important debate will have to be recurred to again, in connexion with the doctrine of “ free ships, free goods.” Suffice it for the present to notice, that the previous question was carried by a majority of 225, only 36 voting the other way.

The subject of *piracy*, which is closely connected with that of *privateering*, has been already referred to (p. 120). It has mostly been discussed of late years in relation (1) to the right of treating vessels employed in transporting slaves from the coast of Africa as engaged in “ piracy ” of that universally recognised and peculiarly heinous sort which is termed “ piracy by the law of nations ; ” and (2) to the right of a State to treat its rebel citizens engaged in maritime warfare against itself as pirates, and to demand all friendly States to treat them as such likewise. Dr. Wheaton has collected the main cases illustrative of the law respecting the former sort of alleged piracy, and Mr. Dana has supplied a very elaborate note on the latter sort (Part II. chap. II.). The essential ingredients in the offence of *piracy*, as

[recognised by the Law of Nations, and not merely by the national law of particular States, or private conventions among them, have already been described as : (1) An intention of violating, coupled with, or evidenced by, acts of violation of the Law of Nations as operating on the high seas, whether such acts are directed against persons or things; and (2) an absence of responsibility towards any recognised sovereign government. Hence the offence may be committed either by persons who in their corporate capacity owe no allegiance to an organised and recognised government, or who for the time or purpose have thrown off such allegiance. The general current of the cases and of the best opinions seem to establish that engaging in the slave-trade is only made *piracy* by special convention; and whether rebels can or cannot be treated as pirates must depend (1) upon the amount of recognition, for belligerent purposes, they receive abroad, and (2) upon their treatment by the parent State.

There seems to be no doubt that a general right of visitation and search exists in the case of a *bonâ fide* suspicion that a ship is a pirate, on the hypothesis that pirates are the enemies of all States. In the case of the *Le Louis* (Dodson's Adm. Rep. vol. II., p. 210), in which the question of the existence of a right of search in time of peace was involved, Sir W. Scott said: "With professed pirates there is no state of peace. They are the enemies of every country, and at all times, and therefore are universally subject to the extreme rights of war." See the recent case of the *Virginus*, mentioned *post* in a note to the chapter on "Search."—ED.]

CHAPTER III.

DECLARATION OF WAR.

IN ancient times war was solemnly declared, either by certain fixed ceremonies, or by the announcement of heralds; and a war commenced without such declaration was regarded as informal and irregular, and contrary to the usage of nations. Grotius says, that a declaration of war is not necessary by the Law of Nature, "*naturali jure nulla requiritur declaratio*," but that it was required by the Law of Nations, "*jure gentium*," by which term, be it remembered, he means the usage of nations. (1) And in this he was right, as, until the age in which he lived, wars were almost invariably preceded by solemn declarations. The Romans, according to Albericus Gentilis, did not grant a triumph for any war which had been commenced without a formal declaration; (2) but the Greeks do not seem to have been at all regular in their observance of this custom. (3) During the times of chivalry declarations of war were usually given with great formality, the habits of knighthood being carried into the customs of general warfare, and it being held mean to fall upon an adversary when unprepared to defend himself. (4) With the decline of chivalry this custom gradually fell into disuse. Gustavus Adolphus invaded Germany without any declaration of war; (5) but this appears to have been an exception to the usages of the age: and Clarendon speaks of declarations of war as being customary in his times,

Declarations
of war usual
in ancient
times.

(1) De Jure, lib. III. c. III. § 6.

(4) Ward's Introduction, Vol.

(2) De Jure Belli, lib. II. § 1.

II. 206—230.

(3) Bynkershoek, Quæst. Jur. Pub. lib. I. c. II.

(5) Zouch, de Judicio inter gentes, P. II. § x. 1.

and blames the war in which the Duke of Buckingham went to France, as entered into "without so much as the formality of a declaration from the king, containing the ground and provocation and end of it, according to custom and obligation in the like cases." (1) Formal denunciations of war by heralds were discontinued about the time of Grotius; the last instance having been, according to Voltaire, (2) when Louis XIII. sent a herald to Brussels to declare war against Spain, in 1635.

Manifestoes
now generally
employed.

Since that period formal declarations of war have fallen into disuse; but manifestoes are generally published by the belligerent governments in their own countries, and communicated to foreign states, proclaiming that war has commenced, and stating the reasons for hostilities. In the beginning of the last century, according to Bynkershoek, declarations of war were not considered necessary; (3) but Vattel says, that declarations of war ought always to be given by manifestoes, humanity requiring that notice should be given of so sad an alternative as war, and it being, for many reasons, desirable to fix the date when the rights of war have commenced. (4) De Martens and Klüber both state that, by the customary Law of Nations, declarations of war are no longer considered necessary, but that it is usual to publish manifestoes, which are communicated to foreign courts. (5)

Many wars
without such
notice.

There are numerous instances in modern times in which war has been entered into without notice of any description. In 1740 Prussia commenced war with

(1) Hist. Reb. Vol. I. 40, ed. 1707.

(2) Sièc. de Louis XIV. tom. I. ch. II.

(3) Quæst. Jur. Pub. lib. I. c. II.

(4) Droit des Gens, liv. III. ch. IV. § 51, 55, 56, 64.

(5) De Martens Précis, liv. VIII. ch. III. § 267. Klüber, Droit des

Gens, P. II. tit. II. § 238.

Austria without any declaration; (1) so did France with Sardinia in 1743; (2) so did the empire with Prussia in 1757; (3) so did France and Great Britain in 1756; (4) Russia invaded Finland, in 1808, without any declaration of war; (5) and, in 1812, the Americans commenced war immediately that the act of Congress had passed, without waiting to communicate their intentions to Great Britain. (6) Thus nearly all the chief states of Europe and America have afforded examples of this practice; but still it may be considered that these are exceptions, and that, according to the usage of nations, war should be proclaimed by manifestoes.

The recall of ambassadors is usually considered as tantamount to a declaration of war. In our treaty with Portugal, in 1812, it is declared, art. XXI., that a rupture of pacific relations is not to be regarded as taking place till the recall, or dismissal, of the respective ambassadors. (7) This article has been adopted by Brazil, in her treaty with France, in 1826; (8) with Prussia, in 1827; (9) with Great Britain, in the same year; (10) and with Denmark, in 1828. (11) And it would be well if this article were generally adopted, as it would prevent the many disputes and difficulties that arise from the want of power to ascertain the date when hostilities have commenced.*

(1) Moser, Versuch, Buch XVIII. c. II. § 4.

(2) *Id.*

(3) *Id.*

(4) Moser, Beyträge, &c. in Kriegs-Zeiten. Th. I. 369.

(5) Annual Reg. for 1808, p. 390.

(6) Kent's Commentaries, I. 54, 55.

(7) De Martens, Supp. VII. 213.

(8) *Id.* X. 870.

(9) *Id.* XI. 471.

(10) *Id.* 483.

(11) *Id.* 613.

[* There are two distinct purposes to be served by the proceeding called a "declaration of war," or by what

[are now considered to be sufficient equivalents. One is to ascertain for a certainty, in the interests of Neutral States, that a war has actually commenced. The other purpose is to determine, in view of judicial processes relating to the capture or confiscation of property, the exact moment at which the war commenced. The advantage of interposing a delay between the announcement of a fully-formed resolution to resort to war and the commencement of hostilities is recommended by a different class of considerations, among which the inconvenience caused to the commercial and social relations of private persons, both in the belligerent and neutral States, and the expediency of affording time for passion to cool and friendly mediation to take place, are some of the most prominent. Mr. Dudley Field, in his "International Code," has inserted a clause to secure the last-mentioned object. Section 709 is: "No nation uniting in this code shall commence a war against any nation whatever without making public within its own territory, and, as far as possible, within the territory of the nation to be attacked, a declaration of war, assigning the reasons thereof, at least sixty days before committing the first act of hostility." It is to be feared that a recognition of what are called "military necessities" will stand in the way of this being adopted for some time to come. One gain would be that, as far as it goes, it would tend to diminish the necessity of maintaining standing military establishments. It has been noticed by M. Rolin-Jacquemyns, in his paper published in 1870 in the *Revue de Droit International*, on the bearing of the war between France and Germany on the Law of Nations, that "in order to mark the commencement of the hostilities, France resorted to a practice which had been abandoned, that of issuing a declaration of war." He then cites in full the letter of M. le Sourd, the French *chargé d'affaires*, addressed to M. de Bismark, on the 19th of July, 1870. The

[last paragraph in that letter is as follows: "En conséquence, le gouvernement Français a jugé qu'il avait le devoir de pourvoir sans retard à la défense de sa dignité et de ses intérêts lésés, et décidé à prendre dans ce but toutes les mesures commandées par la situation qui lui est créée, *il se considère dès-à-présent comme étant en état de guerre avec la Prusse.*"

It is obvious that for the guidance of its own courts of justice a State may select what mark it chooses to determine the epoch of the commencement of war, whether the State itself is a belligerent or a neutral. The date of the publication in the London Gazette of the royal proclamation by which citizens are reminded of their liabilities, would, in the case of England being belligerent, for many judicial purposes, be taken as the epoch at which the war commenced. The historical cases illustrative of the subject will be found collected in Sir R. Phillimore's Commentaries, Part IX., Chap. V. Among these some of the most important for Englishmen are Lord Stowell's judgments in the *Nayade* (4 Rob. Adm. R. 253) and the *Eliza Ann* (1 Dod. Ad. R. 247). In the latter Lord Stowell says: "It is said that the two countries (Sweden and Great Britain) were not in reality in a state of war, because the declaration was *unilateral* only. I am, however, perfectly clear that it was not the less war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the Law of Nations."—ED.]

CHAPTER IV.

OF THE STATE OR CONDITION OF WAR.*

All the subjects of a belligerent State at war with the common enemy.

WHEN war exists between two States, all the individual members of one State are the enemies of all the individual members of the other belligerent State. This is a necessary consequence from the fact that every State is an aggregate of individual members: and the usages of nations have invariably been in accordance with this result of the condition of war. Not that each individual member of one State is allowed to exercise all the rights of war with regard to all individual members of the other State: this, which was once the case, has been mitigated by the practice of modern times, and the exercise of active hostilities, as we shall subsequently have occasion to observe, is confined to those who are expressly commissioned for the purpose. But the state of war exists among those members of belligerent States who are not engaged in active hostilities; no pacific relations, of whatever nature, can be entertained between them, unless under the provisions of express convention: all trade is suspended, no contracts are legal, no

[* A special difficulty attends every effort to place in their true light and relations the practical rules by which the conduct of wars is regulated. Grotius's method, which is followed generally in the text, of opposing the extreme "jus belli" to the "temperamenta" which are in actual use, has the disadvantage of shocking the sensibilities of the reader without proportionate gain in the way of truthful exhibition. On the other hand, many thoroughly accepted doctrines, such as the right in certain circumstances to detain the enemy's citizens and to arrest the payment of debts due to them, can only be rendered intelligible by reference to the broad principles of which the so-called extreme rights of war consist.—ED.]

debts can be enforced, and no suits sustained in courts of law, by or against an enemy.

The prohibition to trade with the enemy has existed in all countries for a great length of time, and has sometimes been enforced with great rigour. In 1740 Spain issued an ordinance forbidding any trade with England, either directly or through neutral nations, on pain of death and confiscation of goods; (1) but fiscal punishment is all that is usually inflicted. Bynkershoek speaks of this cessation of commercial intercourse as inseparable from the nature of war, "*ex naturâ belli commercia inter hostes cessare non est dubitandum*;" (2) and Valin mentions it as a thing uncontested in his time. It is not even permitted to insure enemy's property at sea; it was once the custom in England to make such insurances, and there were instances of its being done so lately as the Seven Years' War; but the practice is now held unlawful in our own country, and in most others, as it has long been in France; (3) but this is rather a regulation of municipal law than part of the Law of Nations, though emanating from the rule we are now considering.*

(1) Moser, Versuch, IX. i. 66.

(3) Valin, liv. III. tit. vi. art.

(2) Bynk. Quæst. Jur. Pub. lib. III.

I. c. III.

[* The leading case on the whole of this subject, including that of "Licence to trade," mentioned in the next paragraph, is that of "The Hoop" (1 Robinson's Admiralty Reports, p. 196), decided by Sir W. Scott. A thorough review of that case, with an account of the law as settled by recent cases in England, is given in Tudor's "*Leading Cases in Mercantile and Maritime Law*." Dr. Abdy's notes to his edition of Kent's Commentaries, chap. iv., may also be consulted for the later expressions of the rules of law in English courts. One important class of questions that presents itself is that connected with *domicile*. If a subject of a belligerent State is domiciled in a neutral country, he acquires all the freedom of trade enjoyed by a neutral citizen. On the other hand, it is illegal for a subject of a belligerent State to import in

Licenses to
trade during
war.

The prohibition to trade with an enemy may be suspended by an express act of the sovereign of a State; for as the sovereign of a State makes war, and entails upon his subjects all the consequences of that relation, he is clearly competent to suspend any part of those consequences, as far as depending on his own power. Licenses to trade with an enemy have accordingly been

a neutral ship goods purchased in the territory of the enemy after the commencement of the war. It is not allowable for the subject of an ally to trade with the enemy during a conjoint war without being liable to forfeiture of his property engaged in such trade in the court of his ally. Where an ally grants a trade licence to its own subjects, Sir W. Scott said (in the case of the *Neptunus*, 6 Rob. 406), "it should be shewn either that the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate State." Any country or port of which the enemy is in the occupation, though taken from a neutral, will, for the purpose of the rule forbidding intercourse with the enemy, be considered as being the enemy's country where it is recognised by the other belligerent as such. It seems, too, to be a settled principle that the produce of the enemy's colony or other territory is treated as hostile property, whatever be the national character or domicile of the owner; and a vessel navigating under the flag and pass of a foreign country is likewise invariably treated as bearing the national character of the country under whose flag she sails. (Robinson's Admiralty Reports, I. 1, *The Vigilantia*; V. 161, *The Vrow Anna Catharina*.) The question of the liabilities incident to domicile, in reference to the present matter, are discussed at some length, and the chief cases passed in review, in Wheaton's "Elements," Part IV. chap. I. It is to be noticed that in the Crimean War, an English order in council of 15th April, 1854, permitted British subjects to trade freely at Russian ports not blockaded in neutral vessels, and in articles not contraband, but not in British vessels. The French orders were to the same effect. The Russian declaration of the 19th of April, 1854, permitted French and English goods, the property of French or English citizens, to be imported into Russia in neutral vessels. The French and Russian governments allowed private communications, not contraband in their nature, to be exchanged between their subjects by telegraph. (See Dana's note to Wheaton.) The general rule seems to be that all contracts made with the enemy during the war are absolutely void, and with respect to those which were made before the war, all right of action upon them is suspended till after the war. In the case of a continuing contract, as that of partnership, even though created before the war, it is dissolved *ipso facto* by the war.—ED.]

granted by governments in numerous instances. But the manner in which these licenses have been granted is a proof of the rule as to the prohibition of commerce, to which they are exceptions. They are interruptions as far as they go of the relation of war. Bynkershoek, speaking of granting such licenses, says, that when the want of each other's commodities produces this permission to trade, the state of war is, so far, suspended, "utcunque autem permittas, sive generaliter, sive specialiter, semper, si me audias, quod ad hæc, status belli suspenditur." (1) The rules of our courts coincide with this opinion, the construction of licenses being strict, and deviation from the express permission of the license entailing the consequences resulting from trade with an enemy, the goods being confiscated if not in accordance with the terms and conditions of the license.

As a nation consists of an aggregate of individuals, the property of a nation is the property of all its individual members; and, as a consequence, a claim to indemnification for injuries sustained from a foreign State may be satisfied by a seizure of the property of any of the individual members of that State.* The practice of States has invariably proceeded upon the admission of this basis. Grotius remarks upon this point that, though one person is naturally not responsible for the offences of another, yet that, by the Law

The property of individuals considered as the property of the State they belong to.

(1) Quæst. Jur. Pub. lib. I. c. III.

[* This is not quite a satisfactory or safe argument to rely upon in order to justify the practice adverted to. The property of a nation is not the property of all its individual members *as existing at any given moment*. The State in whom the ultimate ownership vests is trustee for all its component individual members for all time, and, on this ground, in the case of a seizure of property belonging to any one of its members by the representatives of a foreign State, it is morally bound to make the loss good. A knowledge of this general liability in some measure justifies the seizure of private property in war.—ED.]

of Nations, "jure gentium voluntario," the whole property of the individual members of a State are responsible for the debts or obligations of the State or of the sovereign. (1) And Vattel is still more explicit on this subject; he says, "the property of individuals is, in the aggregate, to be considered as the property of the nation, with respect to other States. * * * * *

* *. A nation being considered, by foreign nations, as constituting only one whole, one single person, all their wealth together can only be considered as the wealth of the same person. * * * * *. If one nation has a right to any part of the property of another, she has an indiscriminate right to the property of the citizens of the latter nation until the debt be discharged." (2) Many very important results proceed from this basis, among them the right of reprisals, by which the property of any subjects of a State are seized to afford indemnity for injuries sustained from either the same or other subjects of the same State.

Persons and
property of
enemies liable
to seizure.

The state of war thus including all the subjects of the belligerent powers, and all their property responsible for the liabilities of the State of which they are subjects, the persons and property of enemies found in a belligerent State, when war breaks out, may be* right-

(1) De Jure, lib. III. c. II. § 2.

(2) Vattel, Droit des Gens, liv. II. ch. VII. § 81, 82.

[* Rather "by a technically strict application of the legal principle." The English right to what are called "Droits of Admiralty" is an instance of the existence and validity (at one time at least) of the most rigorous rules of war in this respect. An account of this right will be found in Sir W. Scott's judgment in the case of *The Rebekkah* (1 Rob. Ad. Rep. p. 227). He says, that the "grant to the Lord High Admiral (evidenced as it was by the Orders in Council of 1665, and by the subsisting practice), gives him the benefit of all captures by whomsoever made, whether commissioned or non-commissioned persons, under certain circumstances of situation and locality, that is, 'of all ships and goods coming into ports, creeks, or roads of England or

fully seized by the government; the individuals as prisoners of war, and the property to satisfy claims on the opposed nation. This practice has generally been mitigated by the forbearance of governments, and has been forbidden in a great number of treaties; but the liability to the enforcement of the rule always exists where not prevented by express convention. By Magna Charta, the merchants of a country at war with us, found in our country when war broke out, were to be detained, "*attachientur*," till it was known how our countrymen, similarly circumstanced, were treated by the enemy; and the subjects of the latter were to be released or detained according to the enemy's conduct. (1) There were numerous instances of the rigid rule being enforced in the middle ages, and it was even sometimes requested that friendly powers would join in its exercise. In 1315, Louis X. wrote to Edward II., stating, that he was going to make war on the Flemings, and requesting him to seize the persons and property of all Flemings found in England: Edward did not comply with the whole of this request; but he commanded all Flemings immediately to quit the kingdom. (2) A few years afterwards, in 1324, Edward II., then about to make war on France, issued an edict for seizing all the French found in his dominions. (3)

As civilization advanced, and the importance of protecting commerce began to be appreciated by governments, this practice became relaxed, and was very often

Leave to retire when war breaks out generally allowed.

(1) See the charters in Blackstone's "*Law Tracts*," XVII., XXXII., II.

(2) Dumont, *Corps Dip.* I. II. 24.

(3) *Id.* I. II. 69.

" 'Ireland, unless they come in voluntarily upon revolt, or are driven in 'by the king's cruisers.' Usage hath construed this to include ships "and goods *already come into ports, creeks, or roads*, and these not "only of England and Ireland, but of all the dominions thereunto "belonging."—ED.]

the subject of special convention. In 1483 Louis XI. granted to the Hanse Towns, that they should be at liberty to remain in his dominions for one year after war broke out, with full protection of persons and goods. (1) In the next century, the sixteenth, it began to be generally agreed, in treaties of commerce, that a specified time, varying from three months to two years, should be allowed to the subjects of either nation, when war broke out, to remain unmolested for the settlement of their affairs, with full liberty to retire peaceably during that period. Of treaties containing such articles a list lies before me too long for insertion. It suffices to say, that not only all the chief European States, but even the Barbary powers, have, in a great number of instances, concluded such agreements. By the treaty between Great Britain and France, in 1786, it was agreed, that the subjects of either power should be allowed to continue to reside, unmolested, in the dominions of the other, notwithstanding the breaking out of war, as long as they comported themselves satisfactorily to the government. (2) A similar article was inserted in our treaty with the United States, in 1795, where it was agreed that the citizens of either power may remain unmolested during war in the dominions of the other, as long as they "behave peaceably and commit no offence against the laws;" and in case either government thought proper to desire their removal, twelve months should be allowed them for that purpose. (3) Likewise by our treaty with Portugal, in 1810, the subjects of either power were to continue unmolested during war, as long as they commit no offence. (4) And a similar article has been inserted in several of the treaties with the States of South America, as that between Great Britain and Rio de la Plata, in

(1) Dumont, III. II. 123.

(3) *Id.* V. 686.

(2) De Martens, Recueil, IV.

(4) *Id.* Supp. VII. 213.

1825, (1) between Great Britain and Columbia in the same year; (2) between France and Brazil, in 1826; (3) between Great Britain and Mexico, in 1824; (4) between Prussia and Brazil, in 1827; (5) and between Denmark and Brazil, in 1828. (6)

But although there have been so many conventions granting exemption from the liabilities resulting from a state of war, the right to seize the property of enemies found in our territory when war breaks out, remains indisputable, according to the Law of Nations, wherever there is no such special convention. All jurists, including the most recent, such as De Martens (7) and Klüber, (8) agree in this decision; and various instances are given by Moser in which this right has been exercised by different States, by either the temporary or the permanent sequestration of the property of one belligerent found in the territory of the other. (9) The United States have coincided in the rule existing in Europe, by an express decision of their supreme court: "However strong," says Chancellor Kent, "the current of authority in favour of the modern and milder construction of the rule of national law on this subject, the point seems to be no longer open for discussion in this country (the United States); and it has been definitely settled, in favour of the ancient and sterner rule, by the supreme court of the United States. The effect of war upon British property, found in the United States, on land, at the commencement of the war, was learnedly discussed and thoroughly considered in the case of 'Brown;' and the circuit-court of the United States,

But the right remains, when there is no special treaty.

(1) De Martens, Recueil, X. 678.

(2) *Id.* 744.

(3) *Id.* Supp. 870.

(4) *Id.* XI. 92.

(5) *Id.* 471.

(6) *Id.* 613.

(7) De Martens, Précis, liv. VIII. ch. iv. § 279.

(8) Klüber, Droit des Gens, tom. II. § 250, 252.

(9) Moser, Versuch, IX. 49—60.

at Boston, decided, as upon a settled rule of the Law of Nations, that the goods of the enemy found in the country and all the vessels and cargoes found afloat in our ports at the commencement of hostilities were liable to seizure and confiscation, and the exercise of the right vested in the discretion of the sovereign of the nation. When the case was brought up, on appeal, before the supreme court of the United States, the broad principle was assumed, that war gave to the sovereign full right to take the persons, and confiscate the property of the enemy wherever found; and that the mitigations of this rigid rule, which the wise and humane policy of modern times had introduced into practice, might more or less affect the exercise of the right, but could not impair the right itself." (1) *

Opinion of
Vattel.

Vattel is not quite explicit, or consistent, when treating of this subject. When treating "of things belonging to the enemy," he allows the seizure of the property of enemies found in a belligerent State, even to the rent of landed property and the debts due from private individuals to subjects of the other belligerent. (2) But when treating of declarations of war, he says, that "the sovereign declaring war can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the

(1) Kent's Commentaries on
American Law, vol. I. 59.

(2) Droit des Gens, liv. III.
ch. v. § 76, 77.

[* A full review and criticism of the judgment of the court in the leading case of *Brown v. The United States* will be found in Dana's note to Wheaton (Part IV. chap. I.). The court was agreed that a right existed to confiscate private property and private debts. Judge Story, with the minority, held, that the power to enforce such confiscation was in each case a function of the executive government. Chief Justice Marshall, on the other hand, with the majority of the court, held, that confiscation could only be resorted to by an express act of the legislature.—ED.]

declaration. They came into his country under the public faith: by permitting them to enter and reside in his territories, he tacitly promised them full liberty and security for their return.” (1) Thus Vattel makes a distinction between the property of resident and that of non-resident enemies; and allows the confiscation of the latter, but forbids the confiscation of the former. It will be remembered that Vattel treats of the Law of Nature, and not of the customary Law of Nations. (2) I confess that I doubt if the principles of equity prescribe the distinction which he makes, while by the customary Law of Nations, no such limitation has been made. But the usage of nations has not been invariable regarding the confiscation of the property of enemies found in a belligerent State, even when unprotected by special treaty. This country has usually adopted the rule of reciprocity, confiscating where the enemy confiscates, and releasing where the enemy releases. The right to confiscate such property seems undisputed, but the exercise of that right has been frequently modified, from considerations of policy or of humanity. *

One description of property is invariably respected during war, namely, the sums due from the State to the enemy, such as the property which the latter may possess in the public funds. An attempt was made by the King

Public debts
never confiscated.

(1) *Droit des Gens*, liv. III. (2) *Vide ante*, p. 39.
ch. IV. § 63.

[* The general rule seems to be that the immovable property of alien enemies is never confiscated, though in certain cases the income may be sequestrated during the war. See Bynkershoek, *Quæst. Jur. Pub. lib. I. c. VII. in notis*. “In omni fere Europâ sola fit immobilium annotatio, ut eorum fructus, durante bello, percipiat fiscus, finito autem bello ipsa immobilia, ex pactis, restituantur pristinis dominis.” Sir R. Phillimore, Part IX. chap. VI., accepts this as a still subsisting principle.—ED.]

of Prussia, in 1752, to apply such property to the purpose of reprisals, but it was an infamous attempt, which neither had example to justify it, nor has it ever been resorted to as a precedent to excuse a breach of public faith. (1) Property in the public funds is justly regarded as entrusted to the faith of the nation; and during the most bitter animosity of our wars with France no attempt has been made, on either side, to confiscate such property, which cannot be touched without a violation of the public faith. (2) Immovable property, such as a landed estate, is also respected during war, though Bynkershoek and Vattel say that the rents arising from such property may be sequestered during war, to prevent their being given to the enemy. (3)

Private debts
suspended,
but not extin-
guished by
war.

Debts due from individuals to subjects of the enemy are not in the same position as debts due from the State, which latter are under the guarantee of the national honour. Debts due from individuals to the enemy may be confiscated by the rigorous application of the rights of war, being the property of the enemy, and therefore liable to confiscation; but the exercise of this right has been discontinued in modern warfare. In the first half of the last century this was regarded as a right of war, but was even then a subject of doubt; Bynkershoek says that there had been many exceptions to the exercise of this right, but he gives it as his opinion that such confiscations are allowable, and says, that if the sovereign does not confiscate debts due from his subjects to the enemy, then the right to claim payment revives when the war has terminated; but that if

(1) For the correspondence on this subject, see the "Causes célèbres du Droit des Gens," by Charles de Martens, Vol. II.

(2) Vattel, *Droit des Gens*, liv. III. ch. v. § 77.

(3) Vattel, *ubi sup.*, Bynkershoek, *Quæst. Jur. Pub. lib. I. c. III.*

he does confiscate them, the right to demand payment has ceased. Vattel says, that the sovereign may confiscate debts due from his subjects to the enemy, "if the term of payment happen in the time of war, or at least he may prohibit his subjects from paying while the war continues: but, at present, a regard to the advantage and safety of commerce has induced all the sovereigns of Europe to act with less rigour on this point: and, as the custom has been generally received, he who should act contrary to it would violate the public faith; for strangers trusted his subjects only from a firm persuasion that the general custom would be observed." (1) Since the time of these writers, a great number of treaties have been made which make special mention of this subject, and provide that the subjects of the contracting parties shall not be liable to have debts due to them confiscated when war breaks out: such provision was made in the treaty between Great Britain and Russia, in 1766; (2) in that between Austria and Russia, in 1785; (3) between France and Russia in 1787; (4) and between Russia and the Sicilies, and Russia and Portugal, in the same year; (5) the articles in the treaties between Russia and Great Britain and Portugal, were renewed in 1797 and 1798; (6) the provision is also made in the treaty between France and the United States, in 1800; (7) between Russia and Sweden in 1801; (8) and in several treaties with the South American States. (9) These treaties are a proof that the practice of confiscating debts was a usage that it was thought necessary to guard against; but this right has hardly ever been exercised in modern

(1) Bynkershoek and Vattel,
ubi supra.

(2) De Martens, Rec. I. 455.

(3) *Id.* IV. 82.

(4) *Id.* 218.

(5) *Id.* IV. 245, 355.

(6) *Id.* VI. 363, 555.

(7) *Id.* VII. 100.

(8) *Id.* 334.

(9) *Id.* Supp. XI. 92, 471, 613.

warfare, the only modern instance being that of Denmark in her last war with Great Britain, when debts due to the British were confiscated by the Danish government. The practice of our own courts coincides with the general usage of Europe; and it may now be regarded as established, that though debts cannot be claimed by an enemy during war, yet that the right to claim payment revives on the return of peace.*

[* See note above on trading with the enemy. Also Tudor's notes on the cases of *The Fortuna*, *The Bremen Flugge* and *The Santa Cruz*. (*Leading Cases in Maritime Law.*)]

CHAPTER V.

OF THE RIGHTS OF A BELLIGERENT WITH REGARD TO
THE PROPERTY OF HIS ENEMY IN A HOSTILE COUNTRY.

ACCORDING to the usages of ancient warfare, all property belonging to the conquered passed to the victor: even property dedicated to sacred purposes was not held exempt, and it was only gradually that spoils of this description obtained some degree of respect. The confiscation of all property whatever was not merely the practice of warriors, but philosophers and moralists approved the custom; and Plato, Aristotle and Cicero, are quoted by Grotius, as saying that all the property of the vanquished rightfully passes to the victor. Grotius, who deduced the Law of Nations from the practice of nations, allows the confiscation or destruction of all property whatever belonging to an enemy. (1) Bynkershoek likewise supports the most rigorous application of the laws of war; he says, that we may rightfully take possession of whatever belongs to an enemy; (2) and subsequently adds, expressly, that by the rights of war we may justly take possession both of the movable and immovable property of an enemy. (3)

In ancient warfare all the property of the vanquished passed to the victor.

The opinion of Vattel corresponds more exactly with the dictates of right, or, in other words, with the law of nature: he admits that war gives a complete right to seize upon an enemy's property; but says, that this, like the other evils of war, can only be permitted as far as called for by the purposes of war, such as to

Opinion of Vattel.

(1) De Jure, lib. III. c. v. vi.

(3) *Id.* c. iv.

(2) Quæst. Jur. Pub. lib. I. c. III.

obtain redress, or to take away the means of future aggression. "We have a right," he says, "to deprive our enemy of his possessions, of every thing which may augment his strength and enable him to make war.

* * * * * Whenever we have an opportunity, we seize on the enemy's property, and convert it to our own use." (1) It is lawful, he subsequently remarks, to appropriate an enemy's property, with a view of weakening him, of punishing him, or of obtaining compensation, and thus, "according to the law of nature, which constitutes the *necessary* Law of Nations, war, founded on justice, is a lawful mode of acquisition. But that sacred law does not authorize even the acquisitions made in a just war, any further than as they are approved by justice; that is to say, no farther than is requisite to obtain complete satisfaction, in the degree necessary for accomplishing the lawful ends we have just mentioned." But though the law of nature makes consistency with justice indispensable to establish an equitable right in acquisitions taken from an enemy, yet as no nation can erect itself into a judge of other independent nations, all acquisitions made in war must be *treated* as rightful, as no nation can take upon itself to question their justice, unless in some most evident and outrageous case. "By the rules of the voluntary Law of Nations," says Vattel, "every regular war is on both sides accounted just, as to its effects; and no one has a right to judge a nation respecting the unreasonableness of her claims, or what she thinks necessary for her own safety. Every acquisition, therefore, which has been made in regular warfare, is valid according to the voluntary Law of Nations, independently of the justice of the cause, and the reasons which may have induced the conqueror to assume the property of what he has taken. Accordingly, nations

(1) *Droit des Gens*, liv. III. ch. ix. § 161.

have ever esteemed conquest a lawful title; and that title has seldom been disputed, unless where it was derived from a war not only unjust in itself, but even destitute of any plausible pretext." (1)

These opinions of Vattel seem to embody the essence of the arguments regarding the right which a belligerent has to the property of his enemy. A nation has a complete right, by the law of nature, to take possession of the property of an enemy, as far as the purposes of equitable satisfaction or the necessities of just warfare require; so as to obtain, in the well known phrase, "indemnity for the past, and security for the future." But no one State has a right to prescribe to another independent State, limits to the extent of its claims to satisfaction, so as to say how far one belligerent is justified in seizing upon the property of another. Thus, as a fact, the law, as declared by Grotius, allowing unlimited right over the property of enemies, still applies as a general rule, where the rule is not excepted from by the usage of nations. Spoliation in a wrong cause can never be consistent with the law of nature; but, by the positive Law of Nations, acquisitions resulting from unjust conquest are regarded as the legitimate property of the captor. Flagrant injustice may induce one State to deny the rightful possession of property seized by another State in an unjust war; but this is a case to be settled by negotiation or hostilities, not by any tribunal engaged in considering property acquired by conquest. Spoliation in an unjust war is a most fearful violation of the laws of God; but it is a question of moral responsibility, not of human jurisdiction, as far as concerns independent States. Property captured in war must be regarded as having equally changed owners, whether the war be just or unjust, whether the

Seizure of property for indemnification justifiable.

(1) *Droit des Gens*, liv. III. ch. XIII. § 193, 194, 195.

seizure be exorbitant or be merely adequate for indemnity; and the general rule authorizing such acquisitions is subject to no human limitation, excepting such as have been introduced by custom, and now form part of the positive Law of Nations.

A victorious State takes the place of the sovereign of a vanquished State.

But the obligations arising from this latter source, the positive Law of Nations, have interfered to alter the laws of war, as they once existed, in a great many particulars. Formerly the lands of the individual subjects of a conquered State were confiscated by the victors; many such instances will immediately present themselves to the memory of the classical student, or to the reader of modern history, in the examples of the conquest of the Gauls by the Franks, and of England by the Normans. But, at the present day, landed property, and immovable property in general, is not liable to confiscation from the effects of war. A conquering State enters upon the rights of the sovereign of a vanquished State; national domain and national revenues pass to the victor; but the immovable property of private individuals is, by the positive Law of Nations, not liable to be seized by the rights of war. This moderation is a great improvement upon the ancient custom; it mitigates the evils of war without interfering with its results; it was a change introduced as civilization advanced; it has been for many centuries the constant usage of European warfare, and is now firmly established as part of the European Law of Nations. (1)

Laws of war regarding movable property.

With regard to movable property, the law is not so moderate in its treatment; movable property is still considered as liable to seizure; but, by the practice of

(1) Vattel, *Droit des Gens*, liv. 282. Klüber, *Par. II. tit. II.*
 III. ch. XIII. § 200. De Martens, § 256.
 Précis, liv. VIII. ch. IV. § 280,

modern warfare, this also is frequently respected, the right of seizing movable property being relinquished for the levy of requisitions, or forced contributions, of different things needed by the invading army; and, as long as these are supplied, all other movable property is respected by the hostile force, and cannot be taken unless paid for, excepting such cases as where towns are taken by assault, or where retaliation is used for the conduct of the enemy. Requisitions, in a hostile country, have advantages over a system of irregular booty, both to the invading army and to the possessors of property in the hostile country; to the invading army, because greater regularity in its supplies may be relied on when irregular plunder is not allowed; and to the possessors of property, because they will only have to supply what the army requires, and not be exposed to the additional evils of the cupidity and license of marauding soldiery. (1)*

Such have been the modifications introduced by the positive Laws of Nations, and now constituting the European usage in wars by land. But in maritime warfare no such moderation has ever been practised. By the treaty between the United States and Prussia, in 1785, made in accordance with what Franklin called his "quaker notions," it was agreed that the merchant ships of the contracting parties should not be liable to capture by each other's cruisers during war; but this article was not renewed in the treaty between the same powers in 1799. With this single exception the practice of States has been always unvaried, in subjecting

Different
practice in
naval warfare.

(1) Vattel, liv. III. ch. ix. *Kriegs-Zeiten*, III. 256.
§ 165. Moser, *Beiträge*, &c. in

[* The same arguments also recommend the payment for requisitions in ready money, and not merely by vouchers to be presented to the government of the invaded State.—ED.]

to confiscation the property of enemies captured at sea. This is partly occasioned by the nature of maritime warfare, of which the object is in a great measure the destruction of the commerce of the enemy; and it may partly result from the connexion between piracy and maritime warfare which formerly existed. But, whatever may be the cause of the practice, such is the fact: the most rigorous construction of the rights of war has always been applied to the private property of enemies found at sea; the positive Law of Nations being determined on this point by the constant and uniform practice of all States in all ages. (1)*

When property is considered to have passed to the captor.

With regard to the time when property may be considered as having passed from its original owner to the captor, the opinions of jurists are not uniform, nor do

(1) De Martens, Précis, liv. VIII. ch. iv. § 281.

[* The possibility of exempting maritime commerce from the operations of naval warfare has been a good deal discussed of late years, and the United States made the acceptance of such an exemption a condition *sine qua non* of their giving in their adhesion to the Declaration of the Treaty of Paris of 1856. An interesting and candid *résumé* of the recent controversy on the subject is given by M. Ortolan in his "*Règles Internationales*," (lib. III. chap. II.). He cites the authority of Napoléon I. in favour of the expediency of adopting the new doctrine. He sums up his own objections to that doctrine under two heads: (1) that the mercantile marine is an instrument of naval force ever ready to come to the aid of the general naval forces, and on this ground must be treated as part of these; (2) that the enormous advantage which a free maritime commerce would afford a belligerent would render illusory the effects of the naval war. M. Ortolan, nevertheless, suggests that some improvements in the direction of favouring private rights might be introduced, as by returning to the private owner some share of the prize. M. Ortolan also traces the history of the gradual exemption of fishing-boats from the operations of a naval war. A similar exemption from capture has been accorded to vessels of discovery, and contended for, or accorded, in cases of shipwreck on a belligerent coast, of forced refuge through stress of weather or want of provisions, and of entering a belligerent port from ignorance of the war. Halleck, ch. xx. *sub fin.*—ED.]

all States conform to the same practice. With regard to any seizure of landed property in war, there is little difficulty; as the Law of Nations does not recognise any right in a victor to confiscate immovable property, the original owner re-enters upon the enjoyment of his right as soon as the hostile occupation ceases; and no transfer to a third party holds good, because the victor never possessed the power to alienate. With regard to movable property captured on land, the general usage is to consider the property as being vested in the captor after a possession of twenty-four hours. No uniform rule exists regarding maritime captures. Grotius says, that prizes made at sea are regarded as having passed to the captor when they have been taken into port or to the captor's fleet; but adds, that, by the later practice of nations, "recenciori jure gentium," twenty-four hours' possession was regarded as transferring the property. (1) Bynkershoek disallows the claim of transference by a possession for twenty-four hours; (2) and says, that to transfer the property nothing is necessary besides real and complete possession; but as it is difficult to say when such real and complete possession has taken place, the property should be conveyed to some place of security, such as the captor's fleet, or to a port of his own, or a friendly country. (3) Vattel also gives this rule of *infra præsidia*; he says that "at sea a ship taken by the enemy may be retaken and delivered by other ships of her own party as long as she has not been carried into some port or into the midst of a fleet: her fate is not decided, nor is the owner's property irrecoverably lost, until the ship be in a place of safety with regard to the enemy who has taken her, and entirely in his power;" (4) but he adds, that different States have different regulations on this subject. In

(1) De Jure, lib. III. c. vi.

(3) *Id.* c. v.

(2) Quæst. Jur. Pub. lib. I. c. iv.

(4) Droit des Gens, liv. III. ch. XIII. § 196.

our own country a regular sentence of condemnation is deemed necessary to establish the change of ownership. But De Martens and Klüber both assert that, by most of the powers of Europe, property captured at sea is regarded as being transferred by a possession of twenty-four hours. (1) *

Right of
laying waste a
country.

It remains to consider one more question of the rights of a belligerent over the property of his enemy, namely, the right of devastating the enemy's country. That this right exists is indisputable; but it is no less certain, that it has often been fearfully abused in the excesses of warfare. It is clearly a belligerent's right to destroy the enemy's property as far as necessary in making fortifications, or in making approaches to those of a place besieged, or in the indiscriminate destruction that takes place in a bombardment, and similar necessary operations of warfare. It may also be allowable, in extreme cases, to destroy the produce in an enemy's country, so as to render it impossible for his army to subsist there, a measure of which the possible efficacy was shewn by the results of the campaign in Russia in 1812. Thus there are cases in which the destruction

(1) De Martens, *Précis*, liv. Droit des Gens, Par. II. tit. II. VIII. ch. iv. § 282, b. Klüber, § 254.

[* The more recent rule would seem to be in favour of the sole, but absolute, necessity of condemnation in a Prize Court. See for the progress of this doctrine, Heffter, § 138. It is not necessary that the capturing enemy have actual possession. It is sufficient if the possession be "not absolute but almost indefeasible," as where a ship has struck. (Sir W. Scott in *The Franklin*, Rob. IV. p. 150.) Where circumstances do not permit property captured at sea to be taken into port, the captor sometimes permits the original owner to "ransom" it. A "ransom bill" is one of those contracts which can only subsist in time of war, though by the 22 Geo. 2, c. 25, s. 1, the making of them was forbidden to English subjects. Circumstances of necessity may still render them allowable even to English captors. (See all the cases enumerated by Phillimore, Part IX. chap. VIII.).]

of the enemy's property may be justifiable, and even imperative; but any single instance in which an injury is committed that is not expressly called for by the circumstances of the case—every unnecessary cruelty—is a crime of which the frequent recurrence in warfare affords no palliation. Destruction of the enemy's property is justifiable as far as indispensable for the purposes of warfare, but no further. In the words of Vattel, "all damage done to the enemy, unnecessarily, every act of hostility that does not tend to procure victory and bring the war to a conclusion, is a licentiousness condemned by the law of nature." (1) *

(1) Droit des Gens. liv. III. ch. ix. § 172.

[* The subject of the present chapter has been much discussed of late years, and formed a prominent topic of debate at the Brussels Conference of 1874. Mr. Dana, in his edition of Wheaton (Part IV. chap. II.) has given a careful and almost exhaustive summary of the existing law, and General Halleck's comments, in his nineteenth chapter on "Enemy's Property on Land," and his thirty-third chapter on the "Rights of Complete Conquest," may both be read with profit for the present purpose. In the Brussels Conference an unsuccessful attempt was made by the German representative to introduce the conception of a sort of "constructive" occupation. It was said, "Generally speaking, the occupying power is established as soon as the population is disarmed, or even where the country is traversed by flying columns. It being impossible to occupy bodily each and every point of a province, the expression *territory* must, as regards occupation, be interpreted liberally." Nearly all the other delegates were opposed to this view, and the Conference finally adopted, as the "modified text" of their proposals on this part of the subject, the terms: "A territory is considered as occupied when it is actually

[“ placed under the authority of the hostile army. The “ occupation only extends to those territories where this “ authority is established and can be exercised.”

The general consideration of the subject divides itself into the rights of a belligerent, first (1) in the case of mere *occupation*, and secondly (2) in that of *completed conquest*.

(1) In the case of *occupation*, the captor acquires, if he pleases, an absolute right of ownership in all movables on which he actually lays his hands, and in the profits, products or rents of all immovables. The acquisition of such a right is, however, at the present day, limited by a number of practical restrictions which humane customs have gradually introduced. Thus, it is not the practice to seize state papers, public archives, historical records, judicial and legal documents; and it has been attempted to extend the restriction to public libraries, monuments of art, the property of religious bodies, and the like. Again, the property of private persons is respected, except in the case of (1) forced contributions; (2) confiscations by way of penalties for military offences; and (3) property taken on the field of battle, or in storming a fortress or town. It is well settled that a belligerent invader can acquire no right in “incorporeal things” not annexed to corporeal things, such as debts, and that even the possession of the documentary evidence of them gives him no such right.

(2) In the case of *completed conquest*, the relations of the belligerents are determined by the treaty of peace, the rule being that the complete title to immovable property can only be accorded by such a treaty, but that when it is made it relates back in time to the moment of the original capture. If the treaty makes no provision about a captured piece of territory, it vests in the possessor.

There is a third situation intermediate between that

[of transitory possession of territory—as in passing through it—and completed conquest: that is, occupation of a large extent of territory during, but only for the purposes of, the war. In this case the invading army steps into the situation of the ordinary government and assumes its civil rights and responsibilities. It acquires a right to sequester the taxes, and even to impose fresh ones for the expenses of government, and all civil acts done under the authority of the invader have a claim to recognition by the government on its recovery of the territory.

A good deal of light is thrown on the actual interpretation set by modern armies upon the rules of the Law of Nations in reference to some parts of this subject, by the accounts of the German invasion of France, in 1870 (see “*The Germans in France*,” by Mr. H. Sutherland Edwards, correspondent of the *Times*, Stanford).

The “Instruction for the Government of the Armies of the United States on the Field,” prepared by the late Professor Lieber, a Prussian by birth, and who in his youth served in the Prussian army, and took part in the campaign of 1814 and 1815, are appended to Mr. Sutherland Edwards’s treatise. They are interesting on many grounds, but especially as furnishing the type of the modern German code of war, and so indicating some of the directions in which the Law of Nations, in reference to war, is moving.]

CHAPTER VI.

OF POSTLIMINIUM.

Meaning of
the term.

POSTLIMINIUM is the name given to the law by which persons or property, captured by an enemy, revert to their original owner, when recaptured from the enemy by individuals belonging to the nation from which they were captured. The word is said to be derived from the return within the confines (*limina*) of a State, which gives occasion to its exercise in certain cases. "Est ergo postliminium," says Grotius, "jus quod nascitur ex reditu in limen, id est fines publicos." (1) If property captured from an enemy be considered as once fully vested in the captor, the captor can afford a good title to such property to whomsoever it may be transferred. In the preceding chapter it has been mentioned that movable property is usually considered as transferred by a possession of twenty-four hours, or by the prize being taken to a place of security. Till such transference has taken place, property recaptured from the enemy reverts to its original possessor, from whom it is not regarded as having passed. "Et vero res," says Grotius, "quæ infra præsidia perductæ nondum sunt, quanquam ab hostibus occupatæ, ideo postliminio non egent, quia dominium nondum mutarent ex gentium jure." (2) But, if the property is once vested in the captor, as a general rule, those who recapture it from the enemy have a right to the property, it being enemy's property, and therefore lawful prize. "Ab hostibus capta," says Bynkershoek, "et deinde recuperata,

(1) De Jure, lib. III. c. IX. § 1.

(2) *Id.* § 16.

recuperantibus cedere, quia occupatio, quæ in bello fit, dominium transtulit, et, ut transtulit occupatio, sic et transfert et recuperatio." * * * * * "Id tamem certissimum, res mobiles, intra præsidia hostium deductas, plene et plane hostium fieri, atque ita ex asse cedere recuperatoribus, si postea deprehendantur." (1) Similar opinions are given by Vattel, (2) and by De Martens. (3)

Such are the opinions of the text-writers on the operation of the law of Postliminium; but, with regard to maritime captures, a great number of different regulations have been made by different States, for the conduct of their own subjects; and many treaties have included articles guaranteeing a reciprocity of favourable treatment respecting recaptures. Almost all these regulations decree restitution to the original owner, upon the payment of a certain salvage to the recaptor; and this salvage varies continually in different instruments, but generally depends partly upon the length of time during which the enemy has possessed the prize, and partly upon whether the recapture has been made by a privateer, or by a ship of war belonging to the government. By the French ordinance of 1584, if a French ship were retaken before she had been twenty-four hours in the enemy's possession, she was to be restored to the original owners, on payment of one-third of the value to the recaptors; but if she had been twenty-four hours in the enemy's possession, the whole prize was to belong to the recaptors. (4) The same regulation is made in the French ordinance of 1681, (5) and in that of 1779; (6) and the same, varying amount of

Different regulations on this subject in different countries.

(1) *Quæst. Jur. Pub. lib. I. c. v.*

(2) *Droit des Gens, liv. III. ch. XIV. § 209, 212.*

(3) *Précis, liv. VIII. ch. IV. § 283.*

(4) *Robinson's Collectanea Maritima, p. 116.*

(5) *Valin, liv. III. tit. IX. art. VIII.*

(6) *De Martens, Rec. III. 128.*

salvage, is agreed to be paid for ships and cargo of either party, recaptured by the other, in the treaty between France and the United Provinces in 1781; (1) such is also the regulation for salvage on recaptures in the treaty between the United States and United Provinces, in 1782, provided the recapture was made by privateers, but if recaptured by the vessels of war of either of the contracting parties, then one-thirtieth of the value of the ship and cargo was to be paid, if the recapture took place within twenty-four hours, and one-tenth if the enemy had had possession for that period. (2). The same agreement was made in the treaty between the United States and Sweden, in 1783; (3) in that between the United States and Prussia, in 1785; (4) and in that between Great Britain and France, in 1786. (5). By the treaty between the United States and Prussia, in 1799, if a ship were recaptured "before being carried into a neutral or enemy's port," one-eighth of the value of the ship and cargo was to be paid to the recaptor, if a ship of war, or one-sixth, if a privateer. (6) By the ordinance of the King of Denmark, in 1810, the recaptor of Danish property was to have one-third of the value of ship and cargo, whether the prize had been more or less than twenty-four hours in the enemy's possession: neutral ships recaptured by Danish vessels to be restored on payment of a "just compensation." (7)

Our own
practice.

Thus it will be seen that no general rule obtains regarding Postliminium, different States having different regulations on the subject; and as it is a question which concerns members of the same State, rather than subjects of different States, its details belong to muni-

(1) De Martens, Rec. III. 341.

(2) *Id.* 463, 465.

(3) *Id.* 574.

(4) *Id.* IV. 46.

(5) *Id.* 175.

(6) *Id.* VI. 686.

(7) *Id.* Supp. v. 497.

cipal law rather than to the Law of Nations. In our own country, property captured at sea and afterwards recaptured, is restored to the original proprietors upon payment of salvage, however long it has been in possession of the enemy, and whether it has been regularly condemned or not. But peace extinguishes all right to claim captured property, whether condemned in a prize-court or not, as the right of Postliminium only exists during war. (1)*

(1) Vattel, *Droit des Gens*, liv. III. ch. xiv. § 216.

[* The subject of Postliminium is worked out very fully by Heffter, § 187. See also Abdy's *Kent*, ch. vi. By the 40th section of the Naval Prize Act of 1864 (27 & 28 Vict. c. xxv.), "where any ship or goods "belonging to any of her Majesty's subjects, after "being taken as prize by the enemy, is or are retaken "from the enemy by any of her Majesty's ships of "war, the same shall be restored by decree of a prize-court to the owner, on his paying as prize salvage "one-eighth part of the value of the prize, to be "decreed and ascertained by the court, or such sum, "not exceeding one-eighth part of the estimated value "of the prize, as may be agreed on between the owner "and recaptors, and approved by order of the court: "provided that, where the recapture is made under "circumstances of special difficulty or danger, the "prize-court may, if it thinks fit, award to the recaptors "as prize salvage a larger part than one-eighth part, "but not exceeding one-fourth part, of the value of the "prize."

The term *postliminium* is used both in the Law of Nations and in the legal systems of particular States, and the uses must be distinguished, though they are both based on the same notion of restoration of legal rights temporarily interrupted through the accidents

[of war. The latter use is sufficiently clear from the above cited statute. In the Law of Nations the term indicates either (1) the claim of a population whose territory has been temporarily occupied or even appropriated by a belligerent, and has been subsequently delivered by the other belligerent or his allies, to have its constitution and government replaced as they were before the war (see Halleck's illustration from the treatment of Genoa in the Treaty of Paris in 1814, ch. xxxv.); or (2) the claim of a belligerent State representing its own citizens as owners against neutrals or allies into whose hands, by sale or recapture, captured property may come. There is much needed, with respect to claims of this sort, a general international rule, regulating both the conditions on which captured property really vests in the captor, even against the original owner, and the amount of salvage due where the property is not regarded as having changed owners by the capture. Sir W. Scott's judgment in the *Santa Cruz* (1 Rob. Adm. Rep., p. 58) may well be read on this subject generally, and particularly with reference to the expediency of adopting the rule of reciprocity where no treaty exists.

"I have heard much," he says, "of the rules which the Law of Nations prescribes on recapture respecting the time when property vests in the captor; and it certainly is a question of much curiosity to inquire what is the true rule on this subject; when I say the *true rule*, I mean only the rule to which civilized nations, attending to just principles, ought to adhere; for the moment you admit, as admitted it must be, that the practice of nations is various, you admit there is *no* rule operating with the proper force and authority of a general law. It may be fit there should be some rule, and it might be either the rule of immediate possession, or the rule of pernoctation and twenty-four hours' possession; or it might be the

[“ rule of bringing *infra præsidia* ; or it might be a
 “ rule requiring an actual sentence of condemnation :
 “ either of these rules might be sufficient for general
 “ practical convenience, although in theory perhaps one
 “ might appear more just than another : but the fact is,
 “ there is no such rule of practice ; nations concur in
 “ principle indeed, so far as to acquire firm and secure
 “ possession ; but their rules of evidence respecting the
 “ possession are so discordant, and lead to such opposite
 “ conclusions, that the mere unity of principle forms no
 “ uniform rule to regulate the general practice. But
 “ were the public opinion of European States more
 “ distinctly agreed on any principle as fit to form the
 “ rule of the Law of Nations on this subject, it by no
 “ means follows that any one nation would lie under an
 “ obligation to observe it. * * * * If I am asked,
 “ under the known diversity of practice on this sub-
 “ ject, what is the proper rule for a State to apply to
 “ the recaptured property of its allies, I should answer
 “ that the liberal and rational proceeding would be to
 “ apply, in the first instance, the rule of that country
 “ to which the recaptured property belongs. I admit
 “ the practice of nations is not so ; but I think such
 “ a rule would be both liberal and just : to the re-
 “ captured it presents his own consent, bound up in
 “ the legislative wisdom of his own country : to the
 “ recaptor it cannot be considered as injurious. Where
 “ the rule of the recaptured would condemn, whilst
 “ the rule of the recaptor prevailing amongst his own
 “ countrymen would restore, it brings (to the latter) an
 “ obvious advantage ; and even in the case of imme-
 “ diate restitution, under the rules of the recaptured,
 “ the recapturing country would rest secure in the reli-
 “ ance of receiving reciprocal justice in its turn.”—
 Ed.]

CHAPTER VI.

OF THE RIGHTS OF WAR WITH REGARD TO THE
PERSON OF THE ENEMY.

Greater
cruelty in
ancient than
in modern
warfare.

IN no part of the Law of Nations do we perceive more forcibly the advance which civilization has produced in morality, than in the diminished cruelty which marks the usages of modern warfare. But it is not only civilization, but Christianity, which has produced this improvement, for it is to the influence of this religion that we must attribute the spread of those correct rules for human intercourse, which are proclaimed by its doctrines, and enforced by its revelations. This will appear evident from remarking how, with all our reasons for desiring a more frequent reference to moral responsibility, the influence of Christianity has placed us, in our social and international relations, far beyond the condition of the classic nations of antiquity, even at the most refined periods of their history, when they were bequeathing to us creations of art which later ages regard as the guides of criticism rather than its objects, and which alternately animate the student by their beauty and discourage him by their unapproachable merit.

Grecian and
Roman war-
fare.

The practice of the Grecian States was more cruel than that of the Romans; their occasional slaughter of their prisoners, their executing the ambassadors sent to them by an enemy, and killing the crews of merchant vessels captured in war, were not imitated by the Romans, whose *fecial* college preserved them from such enormities; although the barbarous gratification of

their triumphs partook more of the exultation of a savage over a fallen enemy than of the generous treatment that might have been expected from warriors such as the Romans.

The northern swarms who overran the Empire were destitute of any trace of respect for humanity, and pursued the horrors of war to their fullest extent ; ignorant of any moral law to restrain their cruelty, and animated by a brutalizing religion which inflamed instead of mitigating their ferocity.

And of the
northern
hordes.

Under the feudal system, the influence of chivalry was manifested in the introduction of a more generous practice into the usages of warfare ; but this was principally the case in the intercourse of the knights with each other ; and they who have had their ideas of the days of chivalry coloured by those beautiful romances which so engross us by imagination as to leave the judgment for a time inactive, will find, with surprise and regret, that that æra of heroic virtues, was also marked by cruelties that are hardly surpassed in the warfare of savages. What will the admirers of the days of chivalry think of its being the custom of warfare to execute captives in the sight of a besieged town, in order to terrify their comrades into submission ?—yet this was done by the hero of Agincourt : or of executing, in cold blood, the garrison of towns that defended themselves bravely ?—yet this was done by that favourite of romance, our Richard I. ; or of hanging all who attempted to succour a place besieged ?—as was done by the Duke of Burgundy, Charles the Bold. Nor were these solitary instances of barbarity ; but appear to have been the usual custom of the times, and to have continued in use till nearly the sixteenth century. Poisoned arms were also occasionally used, and wells and fountains were poisoned, and the barbarous prac-

Cruelty of the
days of
chivalry.

tice of mutilation, of various kinds, was resorted to to an extent that is hardly credible; and, so late as the battle of Agincourt, it was determined by the French to cut off the fingers of the right hand of every captured English archer. Amidst the general desolation of Europe, during the middle ages, the characters of many noble warriors stand out in bold relief, embodying those feelings of generosity, and honour, and heroism, which compose the ideal of knighthood: with these imagination rests; but truth conveys a sterner picture of the times, and extorts the admission, that the warfare of the middle ages was marked by unnecessary cruelty, and savage outrage, and unrelenting vengeance; and though knightly bearing affords occasional relief to the scene, yet these were the general characteristics of the warfare of that period of history. (1)

The opinion
of Grotius.

Grotius, as we have seen in a previous chapter, derived the *Jus Gentium* wholly from the *practice* of nations, and, living when such periods as we have just alluded to afforded the precedents from which he drew his rules, he allows great cruelty in the operations of warfare. The chapter in which he treats of the rights upon the person of the enemy, (2) is, I think, the most faulty in his work, and the one where the errors of his plan are made the most prominent: indeed he himself appears to have seen that the conclusions to which he was led were such as to shew that the process must be erroneous; and he endeavours to supply a remedy, by a limitation of the term *allowable* (*licere*), which he qualifies, by marking the difference between human impunity and moral responsibility; and saying, that many things are allowable, as far as human impunity

(1) See Ward's "Inquiry into the Law of Nations before the Age of Grotius," vol. I. ch. VI.—IX. In the latter are abundant, and

very interesting illustrations of the above positions.

(2) De Jure, lib. III. c. iv.

goes, which are in themselves culpable:—but he still applies the term *Jus Gentium* to the former of these divisions, including under it all that appeared permitted by the practice of nations, although avowedly forbidden by the Law of Nature. (1) Thus Grotius says that it is not only allowable to kill all who bear arms or are the subjects of a belligerent, but all who are within the enemy's territory; (2) and that the subjects of an enemy may be slain wherever they are met with, excepting on neutral territory; (3) and that this permission extends even to women, children, old men, captives, and those who have surrendered at discretion, who may all be massacred (4) according to the *Jus Gentium*. Well might Grotius observe, “*jus gentium permittit multa, eo permittendi modo quem jam explicavimus, quæ jure naturæ sunt vetita.*” (5) But he does not enter upon the investigation of what restraint the Law of Nature should impose upon the usages of warfare practised in former ages, and merely states what was allowable in warfare according to the practices of nations. After an interval of several chapters, Grotius returns to the subject, and recommends moderation, in a chapter entitled “*temperamentum circa jus interficiendi in bello justo;*” and he here says, that no one can justly be slain unless as a just punishment, or because we cannot defend our life or property without such violence: (6) but he does not follow out this principle, but recommends a lenient treatment to be pursued, from considerations of charity, of moderation, and magnanimity. (7) To these motives he appeals for sparing women and children, and old men, and all whose mode of life is opposed to the use of arms, as ministers of religion, husbandmen, and all engaged in traffic. (8) And these

(1) De Jure, lib. III. c. iv.
§ 15.

(2) *Id.* § 6.

(3) *Id.* § 8.

(4) *Id.* § 9, 10, 12.

(5) *Id.* § 15.

(6) *Id.* c. xi. § 2.

(7) *Id.* § 7.

(8) *Id.* § 8, 9, 10, 11, 12.

exceptions from the violence of war he supports by different quotations from various poets, historians and moralists. Yet, at the end of his chapter, he mentions what is the true key to all discussions on the violence that may be used towards an enemy, namely, that all acts of violence which have no tendency to obtain justice, or to terminate the war, are at variance, both with the duty of a Christian, and with humanity itself. (1) Had he but employed this principle in the investigation, he would have blamed the cruelties of ancient warfare, instead of deducing from them inferences of what was allowable in future wars; and would have based the immunity of those who are helpless or harmless, not upon the compassion and magnanimity of the victor, but upon the clear right that they have to exemption from useless cruelty. A better system of philosophy would have saved Grotius from these erroneous conclusions; and so would an attention to the dictates of the Christian religion, which, as far as morality goes, stands the unlearned in the stead of other wisdom, and gives them principles which moral science, at its best, can only attain by other means, or support by other sanctions.

Of Bynkershoek.

Bynkershoek does not discuss the extent to which violence may be carried, so much as the method in which it may be exercised; and, in this, his opinions are of the harshest character. He says, that, in his opinion, all violence in war is just, so that it is allowable to fall upon an enemy even unarmed, to obtain his assassination, to have him carried off by poison, or by machines for explosion (*igne factitio*), or, finally, “*ut uno verbo dicam, quomodocunque libuerit.*” (2) And he subsequently observes, “*quia in victum victori licent omnia, jus quoque vitæ et necis penes victorem esse nemo dubitaverit.*” (3)

(1) *De Jure*, lib. III. c. iv.
§ 19.

(2) *Quæst. Jur. Pub.* lib. I. c. i.

(3) *Id.* c. iii.

Very superior to the opinions of these writers, is the Of Vattel. exposition by Vattel of the principle that should regulate violence in war. The rights of a nation upon an enemy, in a just war, are wholly, he says, "to be deduced from one single principle, from the object of a just war: for, when the end is lawful, he who has a right to pursue that end, has, of course, a right to employ all the means which are necessary for its attainment. * * * * * The lawfulness of the end does not give us a real right to anything farther than barely the means necessary for the attainment of that end. Whatever we do beyond that, is reprobated by the Law of Nature, is faulty, and condemnable at the tribunal of conscience. Hence it is, that the right to such or such acts of hostility varies according to circumstances. What is just and perfectly innocent in war, in one particular situation, is not always so on other occasions. Right goes hand in hand with necessity and the exigency of the case, but never exceeds them." (1)

This appears a correct exposition of the principles that regulate the degree of violence justifiable towards an enemy. War is an evil, recourse to which can only be justified by the necessity of the case, and for the avoidance of greater evils; and no further evil can possibly be right, than is absolutely necessary to obtain the end of war. It is obvious that to cause unnecessary suffering is as much a crime during war as during peace. Neither the absence of human jurisdiction, nor the precedents of former outrage, at all affect the wrongfulness of useless violence in war: if the former were an excuse, it would make legal conviction the measure of right; and the latter would, unfortunately, supply a reason for the commission of almost every

True principle of the degree in which violence is justifiable.

(1) *Droit des Gens*, liv. III. ch. VIII. § 136, 137.

enormity. If the great purposes of justice between nations cannot be preserved from violation without hostilities, recourse to war is justified, and such a degree of slaughter and violence as is inseparable from that condition, and indispensable to attain the end of war, is innocent in the injured, though it attaches a grievous responsibility to the aggressor who occasions such destruction and suffering. To such an extent violence is justifiable; but every commission beyond this is a crime, and as such is forbidden by the Law of Nations. For the Law of Nature, as derived from human reason, and corroborated by inferences from divine revelation, allows no suffering to be inflicted but for the attainment of some just purpose—and only justifies such an extent of infliction as the circumstances of the case render imperative and indispensable.

Regulations
established by
the *customary*
law.

The acts of violence allowable in warfare being thus determined by their necessity for the object of the war, it would seem to be indifferent, according to the Law of Nature, in what manner that violence is exercised; so that it would be as allowable to obtain the ends of justice by destroying an enemy by poison, as by killing him in open battle. But the customs of warfare have interfered to regulate the manner in which violence should be exercised; and many of these usages have become acknowledged parts of the Law of Nations, and cannot now be infringed without violating that law. Thus Grotius says, that though the Law of Nature does not forbid the use of poison in war, yet that the Law of Nations prohibits this mode of destruction. (1) Bynkershoek, as we have just seen, allows any sort of violence to be employed, and does not enter upon the consideration of whether this general rule is modified by the usages of nations. Vattel, on the other hand,

(1) De Jure, lib. III. c. iv. § 16.

will not even admit that poison may be used according to the Law of Nature. But, without entering upon this point, it may now be stated, as decided and uncontradicted, that the Law of Nations does not allow the use of poison in war, nor of poisoned weapons, nor of poisoned fountains or wells, nor of recourse to assassination; and some authors except the use of langridge (*mitraille*); * but this is still sometimes employed, though very rarely—I believe never by the English or French. (1) Thus has custom interfered to prescribe limits to the manner in which violence may be exercised towards an enemy. Such usages, at present, form an integral part of the European Law of Nations; and the Law of Nature now demands their observance, because their neglect by one belligerent would lead to their neglect by his antagonist; and there would thus be no permanent advantage to either party from an infraction of these rules, which would be attended with no other result than an addition of useless cruelty to the already burdened catalogue of the miseries of warfare. †

(1) Vattel, *Droit des Gens*, liv. § 273. Klüber, *Par. II. tit. II. III. ch. VIII. § 155, 156, 157. De § 244.*
Martens, *Précis*, liv. VIII. ch. IV.

[* The modern *mitrailleuse* does not scatter *mitraille* in the sense of fagged iron and the like, but only increases the number of ordinary balls discharged at a single shot.]

[† The most important effort of late years to restrict the use of barbarous methods of warfare was made in 1868 at St. Petersburg by a declaratory convention entered into, on the proposition of Russia, by the States of Great Britain, Austria and Hungary, Bavaria, Belgium, Denmark, France, Greece, Italy, the Netherlands, Persia, Portugal, Prussia and the North German Confederation, Russia, Sweden and Norway, Switzerland, Turkey and Würtemberg. The instrument recited that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of dis-

Exemption of
certain classes.

Dependent on the same principle—that no injury unattended with results upon the issue of the war is allowable,—is the prohibition to attack the persons of certain classes of the enemy, which is now acknowledged as part of the European Law of Nations. Formerly, when nation attacked nation, the whole inhabitants of the hostile State were regarded as liable to the rigours of warfare; and we have seen that Grotius declared such treatment to be according to the *Jus Gentium*; but, at the present day, not only old people, women, and children, are regarded as exempt from the violence of warfare, but also, in general, *all* those subjects of the hostile State who do not bear arms, or who take no active part in hostilities; and also even those who

“abled men or render their death inevitable; that the employment of such arms would, therefore, be contrary to the laws of humanity.” The contracting parties thereupon “engage to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.” (See the document at length in Phillimore, vol. III. 3rd edition, Part IX. chap. VII.) The Conference of 1874 at Brussels adopted the terms of this Declaration in this language. “Art. 12. The laws of war do not allow to a belligerent an unlimited power as to the choice of means of injuring the enemy. Art. 13. According to this principle are strictly forbidden the use of arms, projectiles, or substances, which may cause unnecessary suffering, as well as the use of projectiles prohibited by the Declaration of St. Petersburg in 1868.”

The employment of troops accustomed to savage methods of warfare has been objected to though not formally condemned. M. Rolin-Jacquemyns in his observations, published in the *Revue de Droit International*, 1870, on the bearings of the French and German war on the Law of Nations, calls attention to the transgression of this principle by the French in the employment of “Turkos.” He says that the “French Government, in employing men who make no scruple to mutilate the wounded and to dispatch them on the field of battle, doubly failed in its international duties, both in respect of the Arab tribes from which it borrowed barbarism instead of imparting to them its own civilization, and in respect of the European nations whom it menaced with this illegal instrument.” See also Heffter, § 125.—Ed.]

follow the enemy's camp, but take no part in hostilities—such as medical men, commissaries, sutlers, and all who can be strictly classed as non-combatants. (1) *

(1) De Martens, *ubi sup.* § 272. Klüber, *ubi sup.* § 247, note c.

[* The effective neutralization of all persons and things concerned in the care of the wounded is now secured by the Convention signed at Geneva, August 22nd, 1864, by the plenipotentiaries of Switzerland, Baden, Belgium, Denmark, France, Hesse, Italy, the Netherlands, Portugal, Prussia, Spain and Würtemberg, and to which the British Government subsequently acceded. By Art. I. of this Convention, "ambulances and military hospitals were to be acknowledged to be "neuter, and, as such, to be protected and respected by belligerents "so long as any sick or wounded might be therein." By Art. II. "persons employed in hospitals and ambulances, comprising the staff "for superintendence, medical service, administration, transport of "wounded, as well as chaplains, should participate in the benefit of "neutrality whilst so employed." By Art. VII. a distinctive flag and arm-badge was to be adopted and to bear a red cross on a white ground. The following extracts from the text finally adopted by the Brussels Conference of 1874, on the subject of the regulation of sieges and bombardments may be taken as a tolerably exact expression of the dominant European opinion in reference to this subject. Art. XV. "Fortified places are alone liable to be besieged. Towns, agglomerations of houses or villages, which are open and undefended, cannot be "attacked or bombarded." Art. XVI. "But if a town or fortress, agglomeration of houses, or village be defended, the commander of the attacking "forces should, before commencing a bombardment, and except in the case "of surprise, do all in his power to warn the authorities." Art. XVII. "In the like case all necessary steps should be taken to spare as far as "possible buildings devoted to religion, arts, sciences and charities, "hospitals, and places where sick and wounded are collected, on condition that they are not used at the same time for military purposes. "It is the duty of the besieged to indicate these buildings by special "visible signs to be notified beforehand by the besieged." Art. XVIII. "A town taken by storm should not be given up to the victorious "troops to plunder." The question of the treatment of spies was brought before the Conference, and it is said that "they were by no "means without protection and advocates." The 19th Article of the "modified text" adopted by the Conference is, "No one shall be considered as a spy but those who, acting secretly or under false pretences, "collect, or try to collect, information in districts occupied by the enemy "with the intention of communicating it to the opposing force." By Art. XXII. "Military men who have penetrated within the zone of

Fishing-boats
frequently
exempted.

One other exemption from the effects of hostilities must be mentioned, in the case of fishing-boats, which, enjoying a freedom otherwise unknown in maritime warfare, have, in several wars, been allowed to pursue their trade unmolested. As early as 1521, while war was raging between Charles V. and Francis I., ambassadors from these two sovereigns met at Calais, then English, and it was agreed, that, whereas the herring-fishery was then about to commence, the subjects of both belligerents, engaged in this pursuit, should be safe and unmolested by the other party, and should have leave to fish as in time of peace. (1) A similar exemption for fishing-boats occurred in the last war. In 1800, the British and French governments issued instructions, exempting from seizure the fishing-boats of each other's subjects: this order was subsequently rescinded by the British government, on its being believed that some of the French fishing-boats were equipped as gun-boats, and that some of the French fishermen, who had been prisoners in England, had broken their parole not to serve, and had gone to join the Fleet at Brest. Some angry discussions took place on the subject, but subsequently our restriction was withdrawn, and the freedom of fishing was again allowed on both sides. (2)

Of those by
whom violence
may be
exercised.

Besides this moderation with regard to the persons *on* whom violence may be employed, the Law of Nations is strict in its limitations of the persons *by*

(1) Dumont, Corps Dip. IV. other papers on this subject, in I. 352. De Martens, Recueil, VI. 503—515.

(2) See the correspondence, and

"operations of the enemy's army, with the intention of collecting information, if it has been possible to recognise their military characters"—similarly "individuals sent in balloons to carry despatches and generally to keep up communications between the different parts of an army of a territory"—are excepted from the class of spies.—ED.]

whom hostilities may be exercised. For although all the subjects of one belligerent are the enemies of all the subjects of the other belligerent, yet it is by no means allowed, as in the practice of barbarous States, that every individual member of a belligerent State may exercise all the rights of warfare. The commission of actual hostilities is only allowed, excepting in cases of self-defence, to those who are expressly authorized so to act by the sovereign power. This limitation is as old as the customs of the Romans, who enforced this principle by the most rigorous penalties. But the Roman system was pursued as a part of military discipline, rather than for the reason which now occasions such limitation, namely, a desire to confine the horrors of war within as small a compass as possible. At the present day, it is deemed indispensable that all persons should act under a commission, to entitle them to be treated as enemies, and not as pirates and marauders. This was formerly carried so far that, previous to the French Revolution, there were instances in which militia were hardly allowed the same treatment as troops of the line; but the system of *levée en masse*, which has since taken place in almost all continental States, has removed this inequality; and, at present, all troops, however organized, acting under a regular commission, have a right to demand the same treatment.*

[* The principles which should regulate the distribution of a belligerent population into those who do, and those who do not, take an active part in the war, have been much discussed of late years, in respect both of the claims of the peaceful part of the population to rise *en masse* in order to resist an invader and of the belligerent rights of hastily collected troops of the nature of *franco-tireurs*, militia, volunteers or guerilla bands. The subject was much and warmly discussed at the Brussels Conference, and there is no doubt that the general question presents itself in a very different aspect to those States which possess great standing armies and have designs on the independence of their neighbours, and to the smaller and weaker States which must rely mainly, for their defence, on the efforts of the peaceful part of the popu-

But all unauthorized aggressions are punishable, except in self-defence; this freedom from attack, on the part of troops, being as it were the consequence of that immunity, on the part of enemies not soldiers, which has been just noticed. (1) Some observations have been made, in a previous chapter, (2) on the subject of maritime captures by uncommissioned captors, which is with us carried to the extent that prizes so made, even when the action has commenced in self-defence, do not belong to the captor, but to the sovereign, under the head of what are called *Droits of Admiralty*.*

Importance of
the usages of
European
warfare.

Thus have the usages of nations gradually imposed restraints upon the unlimited violence which marked ancient warfare. These usages have now become so well ascertained that they were recognised even during that reckless disregard of precedent which characterised the early part of the French Revolution; and, in 1791, in the declaration of the National Assembly, drawn up by Condorcet, regarding their intentions as to foreign

(1) See Vattel, *Droit des Gens*, Klüber, *Droit des Gens*, Par. II. liv. III. ch. xv. De Martens, tit. II. § 267.
Précis, liv. VIII. ch. iv. § 271. (2) Vide ch. II.

lation, organized as best may be for the occasion. The restrictions to which suddenly assembled bodies of troops must be subject have not been clearly ascertained by law as yet; and the modifications which are being generally introduced into the constitution of modern armies bring with them ever fresh problems. (See Halleck, ch. XVI.) The general conclusions to which opinion seems to be gravitating may be expressed in the propositions (1) that, in order to ensure treatment by the enemy according to the laws of war, irregular troops must wear some mark discernible at a distance; (2) that they must be commanded by officers bearing a commission from their government, and that they must themselves observe the laws of war. The justice or expediency of treating a population in arms against an invader, according to the rigorous method applied to the case of single non-combatants taking part in the war, is still matter of debate, and no strictly legal rule exists on the subject. (See United States' Instructions.)]

[* See previous note, p. 170.]

States, they expressly declared that peaceable citizens were not to be regarded as enemies by the French armies. (1) All modern usages tend to confine the miseries of warfare within a narrower compass; limiting their destructive scope both in the persons subject to their influence, and in the manner in which violence may be exercised. Every one must rejoice at this improvement, and must perceive, that though it may be vain to expect that arms shall cease to be appealed to in the disputes of nations, yet that the cause of humanity will be materially advanced by the observance of such restraints; so that when wars do occur, the infliction of any misery shall be forbidden that is not absolutely indispensable to obtain the purpose of hostilities. *

(1) De Martens, *Recueil*, V. 308.

[* The recent continental wars, on an almost unprecedented scale of magnitude, have brought into prominence a number of problems for which no legal solution accepted by the common judgment of all States is as yet found. Attempts at solution, of a more or less satisfactory sort, have, indeed, been made, as in the "Instructions" to the United States' armies, and in the discussions of the Brussels Conference. Such problems are those concerning the limits of rights of retaliation for breach of the laws of war; the meaning and limits of what is called "military necessity;" the obligation of obeying military, or so-called "martial" law, in an occupied territory; the right of imposing compulsory military service on an enemy's citizens; the right of resorting to the use of stratagems, treachery and deceitful intelligence; and the exemptions enjoyed by sentinels, outposts, and even certain classes of spies. (See Halleck, chap. XVI.)]

M.

P

CHAPTER VIII.

OF PRISONERS OF WAR.

Leniency introduced by civilization with regard to prisoners of war.

IN the preceding chapter, we have traced the manner in which, as civilization has advanced, a milder and more humane treatment has gradually pervaded the usages of modern warfare, as regards personal violence; and the same improved understanding of what the Law of Nature commands, is observable in the more lenient treatment now usual with regard to prisoners of war. But the amendment of these latter usages has been more gradual; principally, I think, because the customs of warfare, with regard to prisoners, have, till very lately, proceeded wholly upon a wrong basis. It has been customary for many ages to regard captives, not as persons who, because they no longer resisted, are no longer fit objects for violence, but as persons to whom the conqueror has granted life, and of whom he has, in return for that gift, the absolute disposal; so that he might employ them for any purpose, and regard them wholly as his property; treating them as persons who have no longer independent rights of their own.

Their cruel treatment among barbarians.

It is unnecessary to do more than refer to the barbarous cruelties with which prisoners of war are treated by savage nations; but it is with sorrow that we find Grecian warfare stained with such atrocities as the slaughter, in cold blood, of prisoners of war, while other captives were subjected to become the slaves of their conquerors; and in Roman warfare the executioner often terminated in prison the lives of those who had been paraded in the conqueror's triumph. The barbarians who overthrew the empire treated their prisoners,

when they did not make them slaves, not only with a merciless sacrifice of life, slaughtering thousands at a time, but with the details of wanton cruelty that mark the warfare of savages. Even Charlemagne slaughtered, at one time, upwards of four thousand Saxons in cold blood; and long after this we find the heroes of chivalry, Richard I. among them, outraging humanity by similar atrocities.

Such lenity as was granted to prisoners of war during the classic æra, and the succeeding period, till the middle ages, might be partly owing to the clemency of the victor, but the lives of captives were also spared because they were valuable as the slaves of the conqueror. The reader need hardly be reminded that a vanquished people often became the property, if the term may be allowed, of the victorious invader—as the Gauls of the Franks: they changed owners with the soil on which they lived, and were sometimes more nearly regarded as live-stock than as fellow-creatures, were subjected to the most brutal and degrading usages, and only held their lives by the security of an insulting fine. Christianity, a blessing wherever its spirit prevailed, mitigated the hardships of slavery, and occasioned frequent manumissions, and was, undoubtedly, the cause why slavery finally ceased to exist in Europe.

Prisoners
formerly be-
came the slaves
of the victor.

Probably the same reason, that of considering the vanquished as the property of the victor, gave occasion to the custom of demanding ransom for the liberation of prisoners, which was sometimes practised by the Scandinavian nations; and which, in the days of chivalry, was so frequently in use as to become the subject of established rules. These rules Mr. Ward has investigated at some length, and to his interesting treatise I would refer the reader who requires more details than are found in the scanty notice practicable in the present

Custom of
ransom in the
days of
chivalry.

chapter. One rule seems to have been that, unlike booty carried to a common stock, prisoners of war became the property of him who took them; though, in some cases, the king seems to have had the right of claiming them, on the payment of a sort of *maximum* price. Thus the French King is said to have had the privilege of purchasing any prisoner for 10,000 livres; and this was the sum paid by our English King Edward III. as the price of the French King John, from whom he afterwards exacted a ransom said to be equal to 1,500,000*l.* of our present money. It was probably the same sort of prerogative that Henry IV. exercised, when he forbade the Percies to ransom their prisoners taken at Holmdown, and thereby drove that family into rebellion.

Reasons of State sometimes induced a monarch to refuse all ransom for a prisoner; Charles V. of France purchased the famous Captal de Buche of his captor, for 1,200 livres, and shut him up in the Temple at Paris, refusing all offers of ransom made by Edward III.; and Henry V. made it his dying injunction that the Duke of Orleans and Comte d'Eu, made prisoners at Agincourt, should not be released till his infant son was capable of governing; nor were they allowed to ransom themselves till seventeen years afterwards; and Walerland, Count of Saint Pol, being taken by the English, was refused liberty or ransom, but was allowed to be at large on parole, and lived at the court of Edward III., where he married Matilda Courteney, a princess of the blood. But when such reasons of State did not interfere, the captor disposed of his prisoners for his own emolument; and that this was often considerable is shewn by the fact that Bertrand du Guesclin, who was a soldier of fortune, valued his own ransom at 100,000 livres; the captor of David of Scotland was endowed by Edward III. with 500*l.* a-year in land; Charles of Blois had to pay 700,000

crowns for his ransom; Michael de la Pole, Duke of Suffolk, paid 20,000*l.* sterling, when no more than a simple knight; and the Duke of Allençon had to pay 200,000 crowns for his ransom. The large sums acquired by ransoms are supposed to have materially contributed to the great state maintained by many knights; and the English are represented by Philip de Comines as always desirous of a war with France, not only from a wish for the plunder of the towns, but also from a remembrance of the ransoms of the princes and lords who were occasionally taken. And the seneschal of St. Dié is said to have died of regret at losing the great ransom he might have gained, had he taken the Duke of Burgundy prisoner at the battle of Nanci, instead of killing him without knowing who he was.

Prisoners, whose ransoms were known, were occasionally transferred from one owner to another. The Earl of Pembroke, whose ransom was valued at 120,000 livres, was paid over to Du Guesclin, in part of the purchase-money of some estates sold by that general; but the earl was ill, and the money was not to be paid for his ransom till he had recovered, and unfortunately for Du Guesclin, the earl died before he left France, so that the constable lost his money. Some other English prisoners were also transferred at the same time in payment for some Spanish estates.

Prisoners were also sometimes given away as presents from one person to another, as in the case of a prisoner of the house of Blois, presented by Richard II. to the Duke of Ireland, and sold by him to Oliver de Clisson for 120,000 livres. And unfortunate were they who had no means of satisfying the demands of their captors; for the rights of the victor upon his prisoner appear in those days to have been considered as absolute and unlimited; and, as the power of using prisoners as slaves no longer existed, those prisoners who could pay

no ransoms were useless to the captor, and were sometimes the victims of what we now esteem unjustifiable cruelty. In 1441 Charles VII., said to be a prince remarkable for mildness in that age, brought to Paris some English prisoners, who were chained by the neck like dogs, and exposed, nearly naked, to the gaze of the populace: those who could pay their ransom were then set free, but those who could not, who were by far the greater number, were bound hand and foot and thrown into the Seine. And Henry V., when he ordered the prisoners to be slain upon the alarm after the battle of Agincourt, saved those only from whom he expected considerable ransoms. (1) Such was the warfare of the days of chivalry, over which we yet linger with delight, dazzled by their gorgeousness into a forgetfulness of their cruelty, and too intent upon the heroism of a few to consider the sufferings of the many.

Opinion of
Grotius.

It is not surprising that Grotius—deriving the *Jus Gentium* from the practice of nations, and writing when the ages above referred to afforded the precedents from which he drew his conclusions,—should allow the harshest treatment with regard to prisoners of war. He says, that captives may be used as slaves, that their descendants born in captivity are all slaves; that any property they may acquire belongs to their master, and that any violence towards them is allowable, *Jure Gentium*; (2) though he afterwards says, that *naturalis ratio* does not permit cruel treatment. (3) He says, however, that Christians cannot be made slaves by Christians; and in a subsequent chapter, entitled “*temperamentum circa captos*,” he recommends clemency to the owners of slaves; but he fully admits the

(1) For the above, and many other interesting instances, see Mr. Ward's Inquiry, vol. i. 214—320, and vol. ii. 166—188.

(2) De Jure, lib. III. c. vii. § 3.

(3) *Id.* lib. III. c. xiv. § 2.

right of treating prisoners as slaves, to the extent of saying, that such slaves cannot rightfully run away to obtain their freedom, unless, he adds, they are the victims of intolerable hardship. (1)

These maxims sound strangely to an English ear, especially as proceeding from the most enlightened philosopher of his age ; but we are not a little indebted to our peculiar feelings, as Englishmen, for the repulsive distaste with which the thought of slavery affects us ; for those to whom the thought is familiar seem, at the present day, incapable of entertaining that almost instinctive horror with which we contemplate that property in human flesh, from which our nation is now, thank God, at last exempt. But such feelings were not current at the time of Grotius, nor must we impute to him, but to his age, the error of the doctrines which he asserts.

It was, however, with some surprise at first, that I found what harsh opinions were entertained by Bynkershoek, upon whose writings I had always been accustomed to look with much respect. But, like preceding writers, he proceeds upon the supposition that the victor, having the right of life and death, has necessarily the most absolute power over the prisoners whose lives he has spared ; thus he defends the conduct of the Dutch, who hung some Spanish prisoners because they were not ransomed ; and he also mentions it as the usual practice of the Dutch, as they did not employ slaves themselves, to sell to the Spaniards any prisoners whom they took from the Barbary powers ; and he quotes ordinances to this effect, made in 1661 and 1664. (2) These opinions are, at first, surprising, as coming from a most able jurist living in the times of

Accounted for
by his times.

Opinion of
Bynkershoek.

(1) De Jure, lib. III. c. XIV. (2) Quæst. Jur. Pub. lib. I. ch. § 7. III.

George I. and George II. ; but this feeling vanishes as soon as it is recollected that the *assiento* contract, permitting British subjects to convey slaves from Africa to the Spanish West Indies, was the favourite subject of British diplomacy at that period ; that thus Great Britain, if not the thief, was the receiver of stolen goods, and was then habitually acting upon principles that now strike us as monstrous. And, while we disapprove the opinions of Bynkershoek, we must remember that not many years have elapsed since most of the governments of Europe constantly sanctioned practices, regarding the blacks on the coast of Africa, which could only be defended on the principles advanced by Bynkershoek.

Recent period
in which
prisoners were
hardly treated.

The reader will probably be surprised at finding at how recent a period a severe treatment has been employed towards prisoners of war. It was thought necessary to stipulate, in the treaty between England and Spain, in 1604, that prisoners of war should not be sent to the galleys. (1) By the treaty between France and Algiers, in 1628, it was granted that all Frenchmen serving in the ships of the enemies of the Porte might be made slaves. (2) The above article between England and Spain was renewed in 1630. (3) By the treaty of the Pyrenees, in 1659, it appears that prisoners of war were still occasionally sent to the galleys, and to the Spanish settlements in Africa. (4) And so lately as in the war in Ireland, in King William's time, the Count of Solms determined, in 1690, to transport his prisoners to America ; but the Duke of Berwick threatened to retaliate, by sending an equal number of his prisoners to the galleys. (5)

(1) Dumont, Corps Dipl. V. II.

(4) *Id.* VI. II. 278.

35.

(2) *Id.* 559.

(5) Bynk. Quaest. Jur. Pub. lib. I. ch. III.

(3) *Id.* 623.

The practice of ransoming, which was so general in the days of chivalry, was continued till a very recent period, for the purpose of obtaining release *during war*; though at the *end of a war* it has for a long time been usual to stipulate, that prisoners shall be released without any ransom, on paying their just debts, or on their government defraying the cost of their subsistence. Of such articles, declaring that prisoners shall be released without ransom on both sides, a list lies before me too long for insertion; and it is sufficient to say, that it has been the universal practice of all Christian powers since the peace of Munster, in 1648. Between the Christian and Mahometan States the usage with regard to prisoners has not been so regular: we have seen how lately the Dutch were accustomed to sell prisoners from the Barbary States as slaves. In treaties between the Porte and Austria, in 1791, and the Porte and Russia, in 1792, it appears that Christian prisoners were used as domestic slaves in Turkey at that period; (1) but in recent treaties with the Porte, prisoners are exchanged as between Christian States; (2) and the same stipulation is also made in a treaty between the Porte and Persia, in 1823, (3) and between Russia and Persia in 1828. (4) Until Lord Exmouth's expedition,*

Prisoners now released at the end of war among all Christian powers.

(1) De Martens, Rec. V. 249— 1812. Supp. VII. 402, and, in 298. 1829, Supp. XII. 151.

(2) See the treaty with Russia (3) *Id.* Supp. X. 283.
in 1807, *id.* Supp. IV. 458, in (4) *Id.* Supp. XI. 509.

[* A full account of Lord Exmouth's expedition in 1816 against the Barbary powers, in order to enforce the abolition of the practice of Christian slavery, will be found in the 9th chapter of the historical portion of the Annual Register for 1816, and in Russell's Modern Europe, vol. iv. pp. 606, 607, ed. 1842. See also Phillimore's Commentaries, vol. i. p. 345 (2nd edition), and *Recueil de Traité* of De Martens and De Cressy, t. III. p. 263: "Déclaration du Bey de Tripoli, en date du 29 Avril, 1816, portant que l'esclavage des prisonniers de guerre est aboli. Dans les mêmes termes par le Bey de Tunis, 17 Avril, 1816."—ED.]

Christian prisoners were frequently used as slaves by the Barbary powers, and were sometimes ransomed according to a fixed rate. In the treaty between the United States and Morocco, in 1787, it was agreed, that all prisoners were to be exchanged, and not used as slaves, and that any balance of prisoners should be redeemed at the rate of 100 Mexican dollars a man. (1) And, after Lord Exmouth had obtained the freedom of Christian prisoners, the previous permission to employ them as slaves seem recognised in the treaty between Tuscany and Tunis, in 1816, which states, that all prisoners taken before Lord Exmouth's treaty (2) were to be considered as slaves, and ransomed; but that all taken after that period were to be released without ransom. (3)

Cartels.

Agreements by which States determine at what rate prisoners shall be released during war, are termed *Cartels*; and there is this great difference between the cartels of a recent period and the ransoms of the days of chivalry, that a fixed rate is agreed upon by the former, determined by the government, and independent of the caprice of the captor, who no longer holds his prisoners as his property. Of such cartels several lie before me; they stipulate that prisoners of the same military, or naval, rank shall be exchanged against one another, and that the rest are to be ransomed at a fixed rate: this fixed rate varies in different cartels; in that between France and the United Provinces, in 1673, a general-in-chief was to be valued at 50,000 livres, a field-marshal at 20,000, a general at 4,000, &c.; (4) and similar cartels, with slight differences, continued to be made in the wars of that period. (5) In the cartel

(1) De Martens, Rec. IV. 251.

(4) Dumont, Corps Dipl. VII.

(2) See our treaty with Tunis
in 1816, *id.* Supp. VII. 21.

1. 231.

(3) *Id.* 23.

(5) *Id.* 293, and VII. II. 310.

between Great Britain and France, in 1780, an admiral is valued at sixty men, a rear-admiral at thirty, a marshal of France at sixty men, a colonel at twelve men, &c., &c.; each man is to be valued at 1*l*., so that an admiral's ransom would be 60*l*., and others in proportion: and, in this cartel, the men in merchant ships are admitted to ransom; a captain is valued at 4*l*., and a common seaman at 1*l*. (1) Similar have been many other cartels, which all coincide in the principle of exchanging according to grade, with the single exception that, in 1793, the French Convention decreed that they would only exchange prisoners on the condition of exchanging man for man, without any distinction as to grade. (2)

At the present day, a mild and humane treatment exists with regard to Prisoners of War; which is perhaps in some degree attributable to the deference paid to the writings of Vattel, who appears to have been the first author that established the true principles on which prisoners should be treated. He says, that "as soon as your enemy has laid down his arms, and surrendered his person, you have no longer any right over his life, unless he should give you such right by some new attempt, or had before committed against you a crime deserving death." "Prisoners of war," he says, "may be secured, but cannot be made slaves, unless for personal guilt which deserves death; nor be slain, unless we be perfectly assured that our safety demands such a sacrifice." (3)

True principle
for regulating
conduct to the
vanquished.

An exception to the humanity now customary towards prisoners of war was made by the French Convention, in 1794, when they issued a decree, that

Barbarous
exception
made by the
French Con-
vention.

(1) De Martens, Rec. III. 300
—318.

(3) Droit des Gens, liv. III.
ch. VIII. § 148—153.

(2) *Id.* Rec. V. 364,—372.

no prisoners should be made of English, Hanoverians, or Spaniards; and also, that any besieged places, that did not surrender in twenty-four hours from the time of summons, should have their garrisons put to the sword. (1) These barbarous decrees need no com-

(1) De Martens, Rec. V. 374, 375.*

[* See also the account in Alison's History. In July, 1794, a secret understanding had been come to between Prince Coburg (on the part of the allies) and the French generals, that the Austrian troops should retreat unmolested to the Rhine from Belgium, and the French be allowed to retake the four fortresses on French territory held by the allies. The English ministry objected to this and tried to frustrate the plan. The decree alluded to in the text was to hasten the reduction of the four fortresses as secretly agreed to. The nature of the decree will be understood from its language.

Décret, 4 July, 1794.

"La Convention nationale décrète que toutes les troupes des tyrans " coalisées, renfermées dans les places du territoire Français envahies " par l'ennemi sur la frontière du Nord, et qui ne seront par rendues à " discrétion 24 heures après la sommation qui leur en sera faite par les " généraux des armées de la république, ne seront admises à aucune " capitulation et seront passées au fil de l'épée."

Mr. Alison adds to the above account that the Committee of Public Safety disapproved the decree and allowed the garrisons to capitulate as usual. The French officers did not carry it into effect either.

As regards the other decrees mentioned in the text, it may be noticed that the National Convention had, in the previous year, done their utmost to secure a just and fair treatment of prisoners on a footing of reciprocity (see Decree of 25 May, 1793); and that a justification for the violent measures resorted to may be found in the apprehended breach of faith by the allies, as the language of one of the decrees witnesses (11 Aug. 1794). "A défaut par le général en chef de l'armée " Espagnole d'exécuter sur le champ la capitulation de Collisare, en " restituant les prisonniers Français, la Convention nationale décrète " que."

However, it is still more to the purpose to notice that before the end of the year, the National Convention fully recognised the extravagant nature of these decrees, and formally repealed them in the following remarkable language:—

Décret, 30 Déc.

" Sur la proposition d'un membre, portant que les lois de 7 Prairial et " 24 Thermidor portant qu'il ne seroit fait de prisonniers d'Anglais, " Hanoveriens et Espagnols étoient contraires à toutes les lois,

ment, as they inspire but one sentiment. 'The Duke of York did not retaliate upon the French, but continued to treat his prisoners with the usual lenity of modern warfare. The French subsequently revoked their decrees, and coincided in the usual customs of war in a variety of treaties and cartels, several of which are before me, but which it is unnecessary to quote, as they offer nothing new on the subject.

It may be remarked, in conclusion, that the same Conclusion. principles which have been appealed to in the preceding chapter, afford also the clue to the right treatment of Prisoners of War. The usages of former ages proceeded upon the supposition that any violence was allowed in warfare, and that the rights of the victor upon the vanquished were unlimited; and that, having a right to deprive his antagonist of life, the captor had a right to impose any treatment more lenient than death upon his prisoner. But we have seen that, so far from the rights of a belligerent being unlimited, the Law of Nature strictly limits them to such violence as is necessary; that thus, when an antagonist no longer resists, there can no longer be any right to use violence towards him; and that, whenever the purposes of warfare are not frustrated by the granting of quarter, the belligerent cannot refuse to give quarter without a direct violation of the Law of Nature, which warrants no further harshness towards prisoners than is required by the purposes of safe custody and security.

[“ qu’elles contrarioient celles des gens et de la guerre, qu’elles auroient été enlevées par une surprise faite à la Convention, que ces lois étoient même en opposition avec les sentiments qui animent nos braves militaires, qui savent vaincre nos ennemis et jamais assassiner les vaincus; la Convention nationale décrète qu’elle rapporte la loi du 7 Prairial relative aux prisonniers Anglais et Hanoveriens, et Article V. de la loi du 24 Thermidor portant qu’il ne sera fait de prisonniers Espagnols.”—ED.]

[The modern practice with respect to the treatment of Prisoners of War will be found treated with interesting detail in Halleck, chap. XVIII. and Heffter, § 129. The general custom as practised in the most recent wars is, (1) to facilitate in every possible way the exchange or release of prisoners of war, commissaries for this and kindred purposes being permitted to reside in the respective belligerent countries; (2) to release the higher classes of prisoners on *parole* or word of honour, to the effect either that they will not escape, or, if sent home, that they will not take up arms again during the existing war; (3) to treat the different classes of prisoners with the respect due to their several ranks and stations, and to secure that they are supplied with the means of healthy subsistence. For this last purpose, they may be compelled to engage in suitable employments if their own government fails to make (as it is bound) proper arrangements for their support (Vattel, liv. III. chap. VIII. § 154). The most harassing problem is presented when the numbers of prisoners exceed the numbers of the captors, or where (from whatever cause) the captors have not, at the moment, the leisure or capacity to secure them. Some writers have alleged that, in such a case, the captors may be justified in putting their prisoners to death. This is one of those exceptional and rare cases in which the necessities of self-defence might conceivably form a colourable plea for a mitigated judgment after the act, and when all the circumstances are ascertained and weighed; but such conduct can never be justified by a law in anticipation. To use the words of Halleck (see above), "In the present day, the conduct of any general who should deliberately put his prisoners to death would be declared infamous, and no possible excuse would remove the stain from his character."]

BOOK V.

OF NEUTRALITY.



CHAPTER I.

RIGHTS AND DUTIES OF NEUTRAL NATIONS WITH REGARD TO HOSTILITIES.

NEUTRAL nations are, as the term imports, those who, in time of war, are not engaged on either side of the contest. As a general rule, their rights may be stated as consisting in an exemption from any injury from either belligerent, and their duties as comprised in the observance of the strictest impartiality between the contending parties.

Definition of
neutrality.

Nor are the obligations of Neutrality satisfied by the affording equal succour to both parties: they expressly demand the abstaining from any assistance to either belligerent. Thus, it is not allowed to Neutral States to export munitions of war equally to both belligerents; but it is demanded that they shall not afford such assistance to either party: it is not permitted that neutrals shall succour, on both sides, the places which are invested or blockaded by an enemy; but in this, as in the preceding case, it is highly penal to afford such aid to either belligerent. This position is emphatically insisted on by Vattel, and by other writers, and is considered at the present day as the undisputed basis of the conditions of Neutrality. (1)

General duties
of neutrality.

(1) Vattel, *Droit des Gens*, Moser, *Versuch*, X. i. 211. De liv. III. ch. VII. § 104. Bynk. Martens, *Précis*, liv. VIII. ch. *Quæst. Jur. Pub. lib. I. ch. IX.* VII. § 306.

Neutrality
qualified by
antecedent
treaties.

But although the obligations of Neutrality, according to the Law of Nature, demand the abstaining from all interference with either party, and though the Positive Law of Nations exacts the strictest compliance with this principle, wherever no special treaty intervenes—yet the practice of Europe, existing for many centuries, has introduced and sanctioned the rule that treaties, existing *antecedently* to the commencement of war, promising certain succours or exclusive privileges to one belligerent, may be fulfilled without the auxiliary so assisting becoming a party in the contest, or being considered to have quitted the condition of Neutrality. Thus troops may be lent, levies allowed, and the sale of prizes permitted, to one belligerent, by special treaty made before the commencement of war, while the other belligerent finds himself excluded from these important privileges, without Neutrality being thereby infringed, or the latter belligerent, however grievously a sufferer, having the right to demand an equality of treatment. Treaties fraudulently made, such as those contracted before the breaking out of war, but made with a special view of injuring some one power, would justify this latter power in demanding that such treaties should be cancelled, or that the parties should be treated as open enemies; and extreme cases might occur in which a nation would be called upon to declare war, unless privileges stipulated to her antagonist were repealed. If, for instance, the Porte were to grant to Russia that Russian ships of war might, during hostilities, pass and re-pass the Dardanelles, while the ships of no other power should be admitted to this privilege, such a monstrous assistance to one belligerent at the expense of another might justify, and indeed demand, the obtaining by force, if remonstrance were ineffectual, an equality of treatment in so essential a particular. But no breach of Neutrality would be committed by the Porte acting in conformity with such a treaty; and the

antagonist of Russia would have no right, according to the Law of Nations, to complain of the Porte, as long as it merely adhered to a treaty made before the commencement of the war. But in this, as in other applications of the same principle, if the purposes of a belligerent seeking justice be frustrated, or grievously counteracted, by the acts of a neutral, he has the right to demand that such conduct be discontinued, under the penalty of war being declared if it be persisted in; and, this *right* existing, the belligerent will have to consider the *policy* of submitting to this partial assistance to his antagonist, or of declaring war, and drawing upon himself the whole of such an auxiliary's forces, taking the chance of the recompense which may accrue from prizes or conquests.

The most frequent occasions on which such aid has been afforded by a neutral to a belligerent have been by the sending auxiliary forces, stipulated by treaty made before the commencement of war. This practice is objectionable in many respects: it is directly at variance with the true basis of Neutrality, that of affording no succour to either belligerent; but it has now been established by the habitual and concurrent practice of States, and is at the present day an undisputed principle of the European Law of Nations. Auxiliary troops.

The opinion of all the leading authorities coincides with the uniform practice of States, in establishing this principle of the Law of Nations. Vattel has some excellent remarks on this subject. He says that a defensive alliance, which engages an auxiliary to act with his whole forces, makes this contracting party the enemy of the State against which he acts. "But if a defensive alliance has not been made against me in particular, nor concluded at the time when I was openly preparing for war, or had already begun it,—and if the allies have Opinion of Vattel.

only stipulated in it, that each of them shall furnish a stated succour to him who shall be attacked,—I cannot require that they should neglect to fulfil a solemn treaty, which they had an unquestionable right to conclude, without any injury to me. In furnishing my enemy with assistance, they only acquit themselves of a debt; they do me no wrong in discharging it; and consequently they afford me no just grounds for making war on them. Neither can I say that my safety obliges me to attack them; for I should thereby only increase the number of my enemies, and, instead of a slender succour which they furnish against me, should draw on myself the whole power of those nations. It is, therefore, only the troops which they send as auxiliaries, that I am to consider as enemies. These are actually united with my enemies, and fighting against me. The contrary principles would tend to multiply wars, and spread them beyond all bounds, to the common ruin of nations. It is happy for Europe that, in this instance, the established custom is in accord with the true principles." (1)

Of De Martens. Similar is the opinion of De Martens, who says that, rigidly considered, a State has a right to treat as an enemy any power that, either of its own accord or in virtue of any treaty, furnishes military assistance to a belligerent, and by such treatment to enforce the withdrawal of any succour. But there exists an obvious distinction in favour of those who only furnish a certain aid, promised by general and defensive treaties of alliance, or subsidy, made before the commencement of the war; and who, by sending such aid, evince no hostile intentions against any particular belligerent, but only fulfil their previous engagements. It is, therefore, now a generally admitted principle of the Positive Law of

(1) Vattel, *Droit des Gens*, liv. III. ch. vi. § 99, 100, 101.

Nations, I., that not only a State, which only furnishes troops in virtue of a simple treaty of subsidy, does not thereby become the enemy of the State against which these troops are employed, and that these troops alone are to be treated as enemies; but, II., that a State, which only furnishes, for the defence of its ally, a body of troops stipulated by a general defensive treaty, made before the breaking out of war, and which takes no further part in hostilities, is not to be treated as the enemy of the power against which this succour is employed; nor are the treaties existing with such an auxiliary to be regarded as annulled by his having afforded his stipulated assistance. (1)

Dependent on the same principles as the right to send auxiliary forces, is the right to allow Levies of Troops; which permission may be granted to one belligerent while it is denied to his antagonist, if special treaties, antecedent to the war, permit such exclusive privilege of enlistment. This has been the case in many instances, especially in treaties with the Swiss.

Of levies of troops in neutral States.

The customs of the middle ages have had a material influence on the usages regarding Foreign Enlistment. Traces of the principle that auxiliaries are not belligerents, as long as they only afford their stipulated contingents, are found even before the fourteenth century; but it was after the French wars of Edward III., that the practice of employing mercenaries became common in Europe.

Practice of the middle ages.

On the conclusion of peace between France and England, after those wars, a great number of disbanded soldiers formed themselves into what were nothing more than companies of freebooters, who roamed about,

The "companies."

(1) De Martens, Précis, liv. Klüber, Droit des Gens, par. II. VIII. ch. VI. § 304. See also tit. II. § 266.

marauding and levying contributions. They chose their own leaders, and became an embodied army, acting under no commission, but exercising all the violence of war in a time of peace, besieging and pillaging towns, and devastating whole provinces. The condition of the country wherever they marched, was, of course, most deplorable, but they were too powerful to be put down by force. A body of them, sixteen thousand strong, encountered and defeated an army composed of the flower of French chivalry, commanded by a prince of the blood, who was slain in the action; and the victors afterwards marched to Avignon to plunder the Papal territory, but were diverted by the Marquis of Montferrat, who took them into his pay, and employed them in his wars in Italy. A few years after this, these *Companies* were employed in the wars in Spain; Charles the Wise made a treaty with them to evacuate France; and among their leaders they could boast such names as Calverly and Du Guesclin, men whose knightly virtues suspend for a moment the remembrance of the manner in which their energies were occupied, a manner indeed, which, in the age they lived in, was neither thought a stigma nor a crime. After they had been fighting on one side in Spain, the Black Prince summoned to his standard all who owed allegiance to England, and a large body joined the Prince, and were again victorious on the side that they had before defeated. After the wars in Spain were over, they retired into France, and held themselves in readiness to obey the summons of the King of England, who told them he might have occasion for their services; and the King of France also held a body in pay in readiness for any outbreak. Shortly after this, Enguerrand de Courcy entered into a treaty with a band of them, to follow him into Austria, to the succession of which he laid claim. (1)

(1) See Ward's Introduction, vol. II. p. 291—314.

Thus, in the fourteenth century, Italy, Spain, France, and Germany, had been the theatre of the wars of mercenaries; and most of the chief powers in Europe had employed, and recognised, this species of force. The practice of men of one nation going to fight in a quarrel in which they had no concern, and under a standard to which they were foreigners, became common in Europe; and during a war between two nations, a foreign army became the common resort for wild or adventurous spirits from neutral countries. During the Dutch revolt, many English served against the Spaniards; and, in the wars of Gustavus Adolphus, six thousand Scotchmen followed the Marquis of Hamilton to Germany, though our country was neutral at the time. (1)

Mercenary troops usual in the middle ages.

There are a great number of treaties in which the affording such assistance is referred to, and in which it is stipulated that the contracting parties shall restrain their subjects from such interference. In the treaty between Henry VI. and Genoa, in 1460, and in that between Edward IV. and Denmark, in 1465, articles were inserted that neither of these *allies* should assist the enemies of the other. (2) In the treaty between Edward IV. and the King of Castile, in 1467, it is agreed that neither ally shall *allow his subjects* to engage in war against the other. (3) In the treaty between Henry VI. and Louis XI., in 1470-1, it was agreed that neither monarch, *nor the subjects of either*, should engage in hostilities, either for their own quarrels or for the quarrels of others. (4) A similar stipulation occurs in the treaty between Henry VII. and the Duke of Britany, in 1486; (5) and in the treaty between Henry VII. and

Treaties regarding foreign levies.

(1) See the curious agreement between the Marquis of Hamilton and Gustavus Adolphus in the "General Collection of Treaties, &c. since 1495," printed in 1713, vol. II. 271.

(2) Dumont, Corps Dip. III. 1. 583, 586.

(3) *Id.* 589.

(4) *Id.* 601.

(5) *Id.* II. 160.

the King of Denmark, in 1489, (1) and also in a great number of succeeding treaties made by England, as with the Empire in 1502, (2) with Saxony in 1505, (3) with Castile in 1505, (4) with the Empire in 1508, (5) with France in 1514, (6) with Spain in 1515, (7) also in the treaty between France and Spain in 1513, (8) and in a great variety of other instances. (9)

In the treaty between England and Scotland, in 1501-2, after engaging the above stipulation, it is agreed that neither party shall assist the enemies of the other in any invasion; *but that each may assist the enemies of the other, as far as defence goes, without infringing the peace between the contracting powers.* (10)

The country most remarkable for allowing levies of mercenaries has been Switzerland; and this State for a long series of years gave, by treaty, a preference to France, with which power the first of a long series of treaties was made, I believe, in the time of Charles VII. In 1508, the Swiss Cantons decreed that they would not themselves trouble the Emperor Maximilian I. in his expedition to Rome, but that if he attacked the king of France they could not withhold the assistance promised to France. (11) In the treaty between France and Switzerland, in 1516, it was agreed that neither party should allow their subjects to assist any powers at variance with the other, under penalty of their goods and persons. (12) Besides treaties of subsidy with other powers, as with Spain in 1587, renewed

(1) Dumont, Corps Dip. III.
II. 239.

(2) *Id.* IV. I. 84.

(3) *Id.* 75.

(4) *Id.* 76.

(5) *Id.* 103.

(6) *Id.* 183.

(7) *Id.* 215.

(8) *Id.* 179.

(9) *Id.* 129. V. I. 29, 32, 127,
211. V. II. 149, 437, 621.

(10) *Id.* IV. I. 23, 25.

(11) *Id.* 90.

(12) *Id.* 249.

in 1604, (1) and with Venice in 1602, (2) &c., Switzerland had a long series of treaties with France, which were chiefly copies of their treaty of 1521, which agreed that France might levy troops in the Swiss Cantons, to the number of not less than six thousand, and of not more than sixteen thousand, unless with the special consent of the Swiss authorities, and that these troops could not be recalled by their own government while France was at war. (3) This treaty was afterwards renewed in 1549, (4) 1564, (5) 1582, (6) and 1602, (7) and I believe in numerous other instances, the last treaty, with which I am acquainted, in which Switzerland promised this exclusive preference to France, being that between these powers in 1803. (8)

By the treaty of Munster, in 1648, it was agreed that none of the contracting parties should afford to the enemies of the other, arms, money, *soldiers*, provisions, harbour or passage; the right being, however, reserved, to the individual States of the Empire, to serve as mercenaries, according to the constitutions of the Empire. (9)

In 1655, England and Sweden agreed to allow each other to levy troops in each other's dominions, and provided certain conditions for quartering and keeping them in order. (10) In the same year, the United Provinces and the Elector of Brandenburg entered into a similar agreement. (11) In 1661, a similar treaty was made between England and Brandenburg. (12) And, in 1701, Denmark entered into a treaty for

(1) Dumont, Corps Dip. V. i.
459, and V. ii. 38.

(2) *Id.* 21.

(3) *Id.* IV. i. 333.

(4) *Id.* IV. ii. 348.

(5) *Id.* V. i. 129.

(6) *Id.* 429.

(7) *Id.* V. ii. 19.

(8) De Martens, Supp. III. 576.

(9) Dumont, Corps Dip. VI. i.
451.

(10) *Id.* VI. ii. 126.

(11) *Id.* 111.

(12) *Id.* 365.

affording auxiliary troops to England and the United Provinces, stipulating at the same time for the neutrality of Denmark. (1) I need hardly refer to the numerous instances in which, since that period, Great Britain has obtained troops on subsidy, from different German princes, of which most ample records must exist in the documents of our foreign office,—and of our exchequer.

Inference from
these treaties.

Thus there have been a vast number of examples in which different States have made treaties permitting Foreign Enlistment; and in which such conduct would not affect the neutrality of the contracting parties, if the treaties were made before the commencement of war. But I cannot discover that the practice of Europe has ever sanctioned the position, which has been advanced by some men, that neutral nations may permit one belligerent to levy troops in their dominions, and refuse this privilege to the other belligerent,—where there has been no special treaty,—without violating the duties of Neutrality. There have been instances where subjects of a neutral State have assisted one belligerent: but this has not, as far as I am aware, been with the permission of their government; and there have been many instances in which representations, from a belligerent State, that such transactions were proceeding, have induced neutral governments to suppress levies of troops for foreign service.

Opinion of
Bynkershoek.

Bynkershoek, in treating of the levy of troops for foreign service, says, that it was a question which had long agitated Europe, and which still continued to agitate it (*et adhuc turbat*). He states it as his opinion, that it is allowable for any citizen to leave his country,—that when he enters a foreign country he may assume there whatever occupation he chooses,—that thus it is

(1) Dumont, Corps Dip. VIII. i. 1.

allowable for a subject of one State to leave his own country and enter the army of a friendly State. But, he adds, the municipal laws of many States forbid the entering into foreign service; and this was done by the States General in numerous ordinances which he quotes. (1) Thus, Bynkershoek does not examine the question whether levies of troops may be allowed to one, and denied to the other, belligerent.

But Vattel admits of considerable latitude in conduct on this subject. He says, "no act on the part of a nation, which falls within the exercise of her rights, and is done solely with a view to her own good, without partiality, without a design of favouring one power to the prejudice of another,—no act of that kind, I say, can in general be considered as contrary to neutrality: nor does it become such, except on particular occasions, when it cannot take place without injury to one of the parties, who has then a particular right to oppose it. Thus, the besieger has a right to prohibit access to the place besieged. Except in cases of this nature, shall the quarrels of others deprive me of the free exercise of my rights in the pursuit of measures which I judge advantageous to my people? Therefore, when it is the custom of a nation, for the purpose of employing and training her subjects, to permit levies of troops in favour of a particular power to whom she thinks proper to intrust them,—the enemy of that power cannot look upon such permissions as acts of hostility, unless they are given with a view to the invasion of his territories, or the support of an odious and evidently unjust cause. He cannot even demand, as matter of right, that the like favour be granted to him,—because that nation may have reasons for refusing him, which do not hold good with regard to his adversary; and it belongs to

(1) Quæst. Jur. Pub. lib. I. ch. xxii.

that nation alone to judge of what best suits her circumstances. The Switzers, as we have already observed, grant levies of troops to whom they please; and no power has hitherto thought fit to quarrel with them on that head. It must, however, be owned, that, if those levies were considerable, and constituted the principal strength of my enemy, while, without any substantial reason being alleged, I were absolutely refused all levies whatever,—I should have just cause to consider that nation as leagued with my enemy; and, in this case, the care of my own safety would authorize me to treat her as such.” (1)

Vattel's
opinion con-
sidered.

These admissions on the part of Vattel are rather more extensive than might have been expected from a writer who had stated the basis of neutrality to consist, not merely in assisting both parties equally, but in affording no succour to either belligerent: (2) but Vattel was, perhaps, a little influenced by the practices of his native Switzerland in regard to mercenary troops, though these, as far as I am acquainted with them, depended on the rule above stated, which was the result of special treaty. But even the positions of Vattel by no means bear out the arguments of those who have claimed that one *belligerent* may be allowed to levy troops in a neutral State, while the other belligerent is excluded from this privilege. Vattel expressly qualifies his permission, by the clause “without partiality, without a design of favouring one power to the prejudice of another.” And he says, that such permission may be granted “when it is the *custom* of a nation, for the purpose of employing and training her subjects, to permit levies of troops in favour of a *particular* power:” thus Vattel supposes an *antecedent* practice, and does not contemplate that one State may,

(1) Droit des Gens, liv. III. (2) *Id.* § 104.
ch. VII. § 110.

during hostilities, or with a special view to any individual nation, grant this permission to one belligerent, and refuse it to his antagonist. And, after all, Vattel declares, that such assistance would be an act of hostility, if "given with a view to the invasion of the enemy's territories, or the support of an odious and evidently unjust war," and also, "if those levies were considerable, and constituted the principal strength of my enemy, while, without any substantial reason being alleged, I were absolutely refused all levies whatever."

I examine the opinion of Vattel thus in detail, not only from the great attention which is always due to that writer, but because his authority has been alleged, on several occasions, especially in debates on our Foreign Enlistment Act, as favourable to the claim that one *belligerent* may be allowed to make levies in a neutral State,—while his antagonist is refused such assistance,—without the duties of Neutrality being thereby infringed. The opinion of Vattel, as above quoted, by no means sanctions such a permission. He appears to me to have been a little embarrassed by the constant practice of Switzerland to permit levies to France; but this was taken out of the rule that some have contended for, by the fact that such levies proceeded upon special treaties existing through a long series of years; and the Swiss levies were consistent with the state of neutrality, because depending upon treaties *antecedent* to hostilities. And Vattel's opinion, as to the right to grant levies, is qualified by so many restrictions, that it can never be justly interpreted into the permission to grant levies to a power that has not been in the "custom" of raising such troops: much less during the existence or in the expectation of hostilities, can it be claimed, from Vattel's opinion, that one belligerent may be allowed, while the other is denied, such assistance. This would be manifestly abandoning

The subject continued.

that "impartiality," which he declares to be indispensable to the condition of neutrality ; and it would be a violation of the rule of "assistance to *neither* party," which he had laid down as the principle regulating the actions of neutrals in their relations with belligerents.

Remonstrances
in consequence
of foreign
levies.

There have been various instances in which the levying troops for one belligerent has produced, from the opposite party, remonstrances which have occasioned such enlistment to be discontinued. In 1603, Henry IV. and James I. entered into a secret treaty for clandestinely assisting the United Provinces against Spain, and it is stated, "*mais pource que telles assistances peuvent offenser les Espagnols, et les induire tôt ou tard à ouvrir la guerre contre la France et Angleterre, leurs deux majestés en ce cas ont concordé les choses qui ensuivent.*"(1) In 1620, the French ambassador wrote to his court, "Colonel Gray has received permission to levy two thousand men for the King of Bohemia, and has placarded it every where in London, even on the door of the Spanish ambassador, that it is open to every man to take service with that king. Beyond doubt, Gondomar will raise all the louder complaints of this, knowing how much may be obtained by that method from King James."(2) Yet I find that in 1619, the year before, James I. had entered into a mutually defensive alliance with the Elector Palatine and his confederates, agreeing to send them 4,000 troops, or money to the amount of their pay, in case they were attacked ; and they, in the same case, were to send James 2,000 troops.(3) In 1677, during the war between France and Holland, levies in England were allowed to be made both by the Dutch and by the

(1) Dumont, Corps Dip. V. II. 30.

(2) Von Raumer's Illustrations

of the History of the 16th and 17th centuries, letter 64.

(3) Dumont, Corps Dip. V. II. 338.

French; but the Spanish ambassador objected to the levies, and Charles II. issued a proclamation forbidding them. Before this demand by the Spanish ambassador, the Dutch had been allowed by our king to make levies, while the French were not only allowed but assisted in their levies, the public gaols being lent to them as barracks for their recruits, and when the gaols were full, the castle of Edinburgh was assigned to them till their transports were ready. (1) In 1727, General Traun, hearing that levies were being carried on in Massa, complained to the Duchess, who immediately replied, that such levies were contrary to her intentions, and issued a proclamation forbidding any enlistment for the future. (2)

These are all instances in favour of the position, that foreign levies may not be allowed to one belligerent, while refused to his antagonist, consistently with the duties of neutrality. When treaties, *antecedent* to war, permit such exclusive privilege, then, as we have seen, no complaint of breach of neutrality can be maintained by the excluded party. But, when no antecedent treaty exists, such a permission would be a violation of neutrality, the principles of which demand the strictest abstinence from assistance to either party, and, of course, will not admit that exclusive privileges, in so important a particular, should be granted to one belligerent. Nor have the customs of Europe, derived from the practices of the middle ages, established any usage that prevents this question from being settled in accordance with the dictates of reason, or, in other words, with the Law of Nature.

The customs of Europe coincide with the dictates of reason in forbidding such interference.

Most countries have municipal regulations with regard to foreign levies, which regulate the conduct of

The subject usually provided for by

(1) Burnet's Hist. of his own Times, I. 406, ed. 1724.

(2) Moser, Versuch, X. i. 274.

municipal
regulations.

their subjects in this respect. In our own country, the Foreign Enlistment Act of 1819 provides that no British subjects may enter the service of a foreign State, under penalty of fine and imprisonment, unless the act be suspended. Many other States have, I believe, similar regulations. Of course, the suspension of such an act in favour of one belligerent State, to the exclusion of another, would be a dereliction of Neutrality. (1)*

(1) For the regulations of some of the Italian States, see De Martens, *Rec. III* 31, 47, 55, 77.

[*An interesting account of the Foreign Enlistment Acts in the United States and this country, and of the leading cases decided upon them, will be found in Abdy's Edition of *Kent*, chap. VII. (See also the review of the history of the subject contained in Sir A. Cockburn's *Reasons for Dissenting from the Award of the Arbitrators at Geneva*, 1873, and the *Report of the Neutrality Laws Commission*, 1868.) The present English Law upon the subject is regulated by the Foreign Enlistment Act, 1870, which repeals the Act of 1819. Besides following the general prohibitions of the former act against illegal enlistment in the service of a foreign State at war with a friendly State, the act includes an entirely novel and stringent set of precautions against "illegal shipbuilding and illegal expeditions." It provides that any person "building, or agreeing to "build, or causing to be built, or equipping or de-
"spatching any ship with intent or knowledge or having
"reasonable cause to believe that the same shall or will
"be employed in the military or naval service of any
"foreign State at war with any friendly State," will bring himself within the penalties of the act, unless he gives notice to the Secretary of State that he is building or equipping such a ship, and gives such security as the

[Secretary of State may prescribe, that the ship shall not be "despatched, delivered, or removed, without the "licence of her Majesty until the termination of the "war." The act also provides that where such a ship is so built for, delivered to the order of, paid for by, or employed in the military or naval service of such foreign State, "the burden shall be on the builder of such ship "of proving that he did not know that the ship was intended to be so employed in the military or naval "service of such foreign State. Penalties are also "imposed for the offences of adding to the number of "guns, changing those on board for other guns, or "otherwise increasing the warlike force of any ship, "which, at the time of her being within the dominions "of her Majesty, is in the military or naval service of "a foreign State at war with any friendly State."

It is well known that the liability of Neutral Governments, in respect of the acts of their subjects, has been investigated afresh and approximately ascertained (especially as between England and the United States) by the Treaty of Washington of 1871, the Award of the Geneva Arbitration of 1873, and the discussions to which the Treaty and the Award have since given rise. The object of the Treaty was to "remove and adjust "all complaints and claims on the part of the United "States," and to settle all causes of difference between England and the United States, in respect of depredations committed by a ship called the *Alabama*, and other vessels which it was alleged had been built, equipped, or re-fitted in English ports, with the cognizance of the English Government, for the service of the so-called Confederate States, then engaged in war with the United States. The ultimate result of the somewhat protracted negotiations which preceded the Treaty, was the embodiment in it of a reference of the matters in dispute to five arbitrators, to be named by the Governments of the United States, England, Italy,

[Switzerland, and Brazil respectively, the rules of law by which the disputed claims were to be settled being laid down in the Treaty for the guidance of the arbitrators. The English Government expressly guarded itself against the admission that these rules were actually in force when the claims rose. It was willing, however, to abide by their application "in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future." The rules were as follows:—

"A Neutral Government is bound—

"First, to use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction to war-like use.

"Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

The parties to the Treaty agreed not only to observe these rules as between themselves in future, but to bring them to the knowledge of other maritime powers, and to invite them to accede to them. (The proceedings which have taken place in reference to the last mentioned engagement will be found described in the

[“Correspondence with the Government of the United States respecting the communication to other Governments of the Rules of the Treaty of Washington, presented to both Houses of Parliament, 1874.”)

So far as the question of the liability of the English Government, in respect of the escape and subsequent refitting of the *Alabama*, was one of disputed fact, the award of the arbitrators at Geneva is only of ephemeral, or rather historical, interest. But the principles of interpretation applied to the above rules by Sir A. Cockburn, the arbitrator appointed by England on the one hand, and by the four other arbitrators on the other, are matters of permanent importance. The ultimate point in dispute was as to the interpretation to be placed on the expression occurring in the Rules, *due diligence*. The four foreign arbitrators practically substantiated the extreme doctrine laid down in the case submitted by the Government of the United States, the terms of their award being to the effect that “due diligence” was to be estimated by the “risks to which either of the belligerents might be exposed from a failure on the part of neutral governments to fulfil the obligations of neutrality.” In the statement of their case, the United States Government understood by “due diligence” “a diligence proportioned to the magnitude of the subject, and to the dignity and strength of the power which is to exercise it;—a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated;—a diligence which shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, and thus probably dragging it into a war which it would avoid;—a diligence which prompts the neutral to the most energetic measures to discover any purpose of doing the acts forbidden by its good faith as a neutral, and

[“imposes upon it the obligation, when it receives the
“knowledge of an intention to commit such acts, to
“use all the means in its power to prevent it. No
“diligence short of this would be ‘due’; that is, *commensurate with the emergency or with the magnitude
“of the result of negligence.*”

Sir A. Cockburn in giving his reason for dissenting from the views of the other arbitrators was certainly justified in repudiating an interpretation of the well-recognised legal expression “due diligence,” based on a series of such loose and intangible considerations as those adduced in the United States’ “Case.” Sir A. Cockburn looked for an explanation of “due diligence” to the language of modern codes and to the commentaries of jurists of repute. His conclusion was that “one nation has a right to expect from another, in the fulfilment of its international obligations, the amount of diligence which may reasonably be expected from a well-regulated, wise, and conscientious government, according to its institutions, and its ordinary mode of conducting its affairs; but it has no right to expect more.”

With respect to the merits of the controversy, it would seem that Sir A. Cockburn, not unnaturally impatient with the rhetorical language in which the United States clothed this part of their case, and distracted by the repeated juridical assertions about diligence being measurable by the customary conduct of an average householder in the management of his own affairs, overlooked a truth which the United States were struggling to express, and which formed the real basis of the award by the majority of the arbitrators. This truth is, that due diligence is variable with the changing requirements of law in varying circumstances; and, though a householder may have one standard of activity for the management of his own affairs, yet the law obliges him throughout the day to exhibit a variety of

[degrees of mental alacrity, according to the situation and legal claims of the persons with whom he is successively brought into contact. "Due diligence" is, in fact, the amount and kind of mental alacrity which the law, in the special circumstances, demands. This is illustrated by the care exacted from a driver in a public thoroughfare, or from the captain of a steamship in a crowded river. In these cases it is wholly irrelevant to inquire as to the amount of circumspection which the driver might ordinarily show in his own park, or the captain in a private lake or in the open sea.

There is no doubt that the requirements contained in the American Case present a canon of neutral action which would be found intolerable by neutral States, and which belligerents have no claim to exact from them. The real amount of diligence which constitutes "due" diligence can only be ascertained either by consulting the existing international requirements in the particular crisis, and comparing them with the actual conduct of the persons implicated, or else, after framing a treaty by which certain acts or omissions shall be taken as irresistible presumptions of want of "due diligence," testing each case which presents itself by reference to it.

It is interesting to notice that the lately formed Institute of International Law, in considering the Rules of the Treaty of Washington at its meeting at Brussels in 1874, came to the conclusion that these Rules "only applied the recognised principles of the Law of Nations, that it is the duty of a neutral State, which desires to remain at peace and in amity with the belligerents, and to enjoy the rights of neutrality, to abstain from taking any part in the war by affording military aid to one or both of the belligerents, and to take care that (*veiller à ce que*) no acts which would constitute such co-operation in the war be committed by any one within its territory." The

[Institute further announced its opinion that "to avoid " the controversies which have arisen on the interpretation of those Rules, it would be desirable to revise " their expression." The important principle is also laid down, by way of comment on the United States' case, that "the fact that a hostile act has been committed on neutral territory does not suffice to make " the neutral State responsible. To establish the violation by it of its duty, there must be proved either " hostile intention (*dolus*) or negligence (*culpa*)." This meeting of the Institute was of a highly representative character; and was, in fact, attended by all the leading international jurists of Europe.

See, in reference to the above subject generally, "Examen des Trois Règles de Droit International proposées dans le Traité de Washington, par M. Charles Calvo (Gand)." "A Historical Account of the Neutrality of Great Britain during the American Civil War, by Mountague Bernard, 1870." "Papers relating to the Proceedings of the Tribunal of Arbitration at Geneva presented to both Houses of Parliament, 1873."]

CHAPTER II.

OF THE RIGHT OF PASSAGE THROUGH A NEUTRAL
TERRITORY.

THE rights and obligations respecting Passage through a neutral territory depend on the same principles as the subject discussed in the last chapter. As such Passage has a direct influence on hostilities, it cannot be granted to one belligerent and be denied to the other, without an infraction of neutrality,—unless such right of Passage has been granted to one belligerent by antecedent treaty; in which case, by the Positive Law of Nations, it is regarded as an innocent act, and is not considered as a dereliction of neutrality.

General
principle on
this subject.

Grotius mentions the question of Passage when treating generally of the condition of neutrals, whose duties he states as consisting in doing nothing that may assist an unjust cause, and nothing which may impede a just cause:—in a doubtful cause they ought to pursue an impartial line, as in *permitting passage*, affording supplies, and abstaining from assisting places besieged. (1) On the other hand, Grotius says, that those who are permitted to pass through a neutral territory, must be particular in their care to avoid doing any injury; and he cites instances in which such order had been preserved, that the passage of troops was quite innocuous to the neutral State: among others he quotes the Parthian expedition of Alexander Severus, where such discipline was maintained among the troops “ut non

Opinion of
Grotius.

(1) De Jure, lib. III. c. vii. § 3.

milites sed senatores dicerentur; quacumque iter milites faciebant, tribuni accincti, centuriones verecundi, milites amabiles erant," &c. (1) With regard to the *right* of Passage, Grotius asserts, generally, that nothing but the extremest necessity can give us any right over the property of another; and that before necessity can give us any such right, it must be shewn that the owner has not an equal necessity for the same thing. (2) Deducing from this a principle for guidance respecting the right of Passage, it would seem to be the opinion of Grotius, that before the right of passing can be claimed, from the exigency of the case, it must be shewn that the exercise of the right to forbid passage is not equally important to the sovereign of the neutral country. And, notwithstanding the examples given by Grotius of the pristine discipline of the Roman legions, it may be feared that modern armies do not abound in "respectable captains and amiable soldiers," to the extent of making the passage of an army a matter of otherwise than very grievous injury to the country through which they pass.

Opinion of
Vattel.

Vattel says, that the Passage of troops, being by no means a matter of indifference to the State through which they pass, cannot be claimed without the neutral sovereign's permission. "To enter his territory without his consent, is a violation of his rights of sovereignty and supreme dominion." "The tranquillity and the common safety of nations require that each should be mistress of her own territory, and at liberty to refuse every foreign army an entrance, when she has not departed from her natural liberties in that respect by treaties." But, if there should be any of "those very uncommon cases which admit of the most evident demonstration that the passage required is wholly un-

(1) De Jure, lib. III. c. vii. § 2.

(2) *Id.* § 1.

attended with inconvenience or danger," then Vattel thinks that passage should be granted, and that it may be forced in case of refusal; and he says also, that "extreme necessity" may justify forcing a passage, as when "an army find themselves exposed to imminent destruction, or unable to return to their own country, unless they pass through neutral territories." In all cases, except those of extreme necessity, Vattel says that the neutral sovereign is justified in refusing passage, by the fear of danger from admitting troops into his territories, from the fear of the resentment of the opposite party, or from the fear of having his dominions made the theatre of war. A neutral State *may*, he says, grant passage without the opposed belligerent having a right to complain;—but if passage is granted, or refused, to one belligerent, it must also be granted or refused to the other, "unless a change of circumstances affords substantial reasons for acting otherwise. Without such reasons, to grant to one party what she refuses to the other, would be a partial distinction, and a departure from the line of strict neutrality." (1)

De Martens gives it as his opinion, that a neutral sovereign may, when there are no special treaties, forbid all Passage through his territory; but that it is no violation of neutrality to allow to both parties this privilege. Moreover the granting such privilege to one party, and refusing it to the other, would not *always* be considered a violation of neutrality, if this conduct were already usual in time of peace, or if it were the result of general treaties *anterior* to a rupture. But, on the other hand, that sovereign would infringe the duties of neutrality, who, without such antecedent engagements, permitted Passage, or the levy of troops, to one belligerent and refused them to the other. (2)

Opinion of
De Martens.

(1) Droit des Gens, liv. III.
ch. VII. § 119—135.

(2) Précis, liv. VIII. ch. VII.
§ 310. See also Moser, Versuch,
X. i. 238.

Treaties on
this subject.

The subject is mentioned in a great variety of treaties, which all coincide, in spirit, with the opinions above quoted. In the alliance between France and Switzerland, in 1452, it was stipulated that the Swiss should not allow passage through their territories to the enemies of France; (1) and this article was inserted in a great number of subsequent treaties between the same powers; the last instance, as far as I am aware, being in the treaty of 1803. (2) In 1512, Louis XII. and the King of Navarre agreed to allow no passage to the enemies of the other party: in consequence, when the King of Arragon and Castile demanded passage, he was refused; and, using this as a pretext for hostilities, he overran Navarre. (3) By the treaty of Munster, in 1648, the German princes were to be allowed passage through each other's dominions; but passage is otherwise expressly forbidden by the same treaty. (4) The clause that neither party shall allow passage to the enemies of the other, is inserted in a great many subsequent treaties, of which a list lies before me, too long for insertion. And, whenever the integrity of a neutral territory was violated by the passage of troops, it was invariably considered as an unjustifiable aggression. (5) In 1792, Russia and Austria agreed that they would *conjointly request* passage for their troops through the territory of third parties. (6) And, in 1798, Russia and the King of Naples agreed that they would *request* the Emperor and the Porte to allow the passage of certain troops. (7) During the numerous aggressive wars after the French Revolution, it became a constant

(1) Dumont, Corps Dip. III. I. 193.

(2) De Martens, Rec. Supp. III. 570.

(3) Dumont, Corps Dip. IV. I. 148.

(4) *Id.* VI. I. 451, 459.

(5) See the instance when

Count Merzi entered Switzerland in his invasion of Alsace in 1709, in Coxe's *Life of Marlborough*, III. 112: for other instances see Moser, *Versuch*, X. I. 218, 238, *et seq.*

(6) De Martens, Rec. V. 349.

(7) *Id.* VI. 525.

object of French diplomacy to obtain this privilege for the French armies, which was done in a great variety of treaties; see, for instance, that with Prussia, in 1796, (for the county of La Mark); (1) and, in the same year, those with Sardinia, Parma, the Pope, Wirtemberg, Baden, and Bavaria; (2) and, in 1800, the treaties with the Princes of Isenburg, Hesse Homburg, Wied, and Nassau. (3) And by the Confederation of the Rhine, in 1806, passage was to be allowed to the troops of any of the members, but was to be refused to any who were not members of the Confederation. (4)

Thus the right to forbid the passage of foreign troops has been considered so inseparable a consequence of the right of a State over its own territory, that Napoleon I. considered it proper to provide for such a contingency by special treaty, even at a time when he was violating the Law of Nations in many flagrant instances.

Principles
regulating the
grant of
passage.

It may, in conclusion, be safely asserted that the opinion of jurists, and the spirit of treaties agree with the dictates of reason, in the principle that the passage

(1) De Martens, *Rec. V.* 57.

(3) *Id.* VII. 113, 116, 118, 121.

(2) *Id.* 215, 226, 240, 265, 277,
294.

(4) *Id.* Supp. IV. 385, 389,
392, 394, 397, 482, 484.*

[* The "Act of the Confederation of the Rhenish League of July 12th, 1806," does not itself contain or contemplate stipulations to this effect, but in the course of the same year Napoleon, as "protector of the Confederation," made treaties separately with members of the Confederation, and more especially with such States as subsequently joined the Confederation. These treaties usually included a clause of the following form, which is that of Article IV. of the Treaty concluded at Posen between Napoleon and the Elector of Saxony. "Il ne pourra, sans le consentement préalable de la Confédération du Rhin, être dans aucun cas et pour quelque cause que ce soit donné passage par le Royaume de Saxe à aucunes troupes, à aucuns corps, ou détachements de troupes d'aucune puissance étrangère à ladite Confédération."—ED.]

of troops cannot be *claimed* unless under special treaty, and cannot be *granted* by a neutral, where there is no antecedent treaty, unless an equality of privilege be allowed to both belligerents.*

[* In the Franco-German war of 1870, the duties of Neutral States, the territory of which bordered the territory of the belligerents, were matters of some discussion. Thus it was attempted by the German government, at the commencement of the war, to induce the Belgian government to permit the passage through Belgian territory of wounded Prussians and French. On a communication being made to the French government, the latter replied that they would regard the passage of Prussian wounded through Belgian territory as a violation of neutrality. The Belgian government even went the length of not allowing wounded French or German soldiers to take a seat in a railway train. It was the practice of the Belgian government to disarm and detain as prisoners all soldiers of either of the belligerent armies, whether isolated or in companies, who were driven by the enemy on to Belgian territory. (See an account of these facts and a critical examination of them in M. Rolin-Jacquemyns' essay, published in 1870 in the "Revue de Droit International," on "La Guerre actuelle dans ses Rapports avec le Droit International.")]

CHAPTER III.

GENERAL CONSIDERATIONS REGARDING THE RIGHTS
OF NEUTRALS AND BELLIGERENTS AS TO COMMERCE
IN TIME OF WAR.

WITH respect to neutral commerce in time of war, the words written by Grotius two centuries ago have been applicable on the most recent occasions: "*Nam et olim et nuper de eâ re acriter certatum scimus, cum alii belligorem, alii commerciorum libertatem defenderent.*" (1) From the conflict of opinions, however, clearer views of the relative rights of the parties interested have been by degrees established, and although some points are still the subjects of unsettled controversy, yet those of most importance have been determined, either by the clear proof of what justice demands, or by the practice of States agreeing in the same constant usage.

Unsettled state
of this ques-
tion.

The difficulties of the question arise from an apparent collision between the rights of neutrals and those of belligerents. It is the argument for neutrals that commerce, being necessary for the full development of the resources of a State and the happiness of its members, is a thing to which a State has a perfect right, and with which therefore no other State can, with justice, interfere. If war breaks out, it is a contingency which affects the belligerent States, and should affect them only, the trade of those who are not parties to the contest remaining exactly as if no such contest were taking place.

From whence
arising. Claims
of neutrals.

(1) *De Jure*, lib. III. c. 1, § 5.

Claims of
belligerents.

On the other hand it is the argument for belligerents, that war being a perfect right, no State, not a party to the contest, can be allowed to interfere with that right, either by augmenting the resources of one of the parties, or by doing anything whatever that may affect the issue of the contest. It is from this collision of rights that we have to extricate the various questions of neutral commerce, and to take the guidance of reason for the discovery of what justice demands.

How recon-
ciled.

The greatest liberty which law should allow, in civil government, is the power of doing everything that does not injure any other person: and the greatest liberty which justice among nations demands is, that every State may do anything that does not injure another State with which it is at amity. The freedom of commerce and the rights of war, both undoubted, as long as no injustice results from them, become questionable as soon as their exercise is grievously injurious to any independent State. But the great difference of the interests concerned make the trivial nature of the restrictions that can justly be placed upon neutrals appear inconsiderable, when balanced against the magnitude of the national enterprises which unrestricted neutral trade might compromise. That some interference is justifiable will be obvious, on the consideration that if a neutral had the power of unrestricted commerce, he might carry, to a port blockaded and on the point of surrendering, provisions which should enable it to hold out, and so change the whole issue of a war; and thus the vital interests of a nation might be sacrificed to augment the riches of a single individual. The possibility of such extreme cases, however, is never entertained: yet the writings of all jurists, and the practice of all States, coincide with the clear dictates of reason, that some restrictions on neutral commerce are allowable. But it must be acknowledged that there

are many difficulties in deducing, from the obvious principles of justice, the application of acknowledged rules to individual instances remote from the cases where reason does not hesitate in its decisions.

Two centuries ago, when the great powers of Europe were nearly constantly belligerent, the claims of neutrals met with too little consideration from the monarchs with whose interests they interfered. The prize laws of France and Spain, existing at that period, are of notorious severity; and the trade of neutrals seems to have been regarded more as an affair of sufferance than as a question of right. Albericus Gentilis, and Grotius, who wrote at that period, speak of neutral commerce as a question of great intricacy, and as not settled by any consistent practice. But more recently, when the importance of commerce has been more exactly appreciated, and when some of the most powerful States have been neutral during great wars, the rights of neutrals have, as a general rule, been understood and admitted; and in some cases their claims have outstripped their rights, and have infringed the just pretensions of belligerents. During the war consequent upon the American Revolution, when France, Spain, the United Provinces, and Great Britain, were belligerents, the demands of neutrals, as stated in the terms of the Armed Neutrality, were an infringement, supported by force, on the rights of belligerents. On the other hand, during the war with Napoleon I., the rights of neutrals suffered greater violence from belligerents than had ever been the case since the Law of Nations was acknowledged as a science.

Difference which time has produced in such considerations.

[Of late years the claims of neutrals, especially in respect of freedom of trade with belligerents, have been put forward with much greater force and persistency than at any former period. To this the general attitude

[maintained by the United States, and the increasingly pacific tendencies of England, have largely contributed. The enormous growth of commercial wealth, the habits of free trade and free locomotion, the accession to the numbers of influential States, and therefore, in a given war, to the united strength of neutral interests, are all obvious circumstances which have been long steadily working in the same direction.]

I cannot but think it most desirable that the great maritime powers should, during the time of peace, stipulate by definite treaties, where none such already exist, what course shall be pursued regarding commerce during war. The miseries of war must ever be deplorable; but much vexation, much angry feeling, and perhaps additional bloodshed, may be spared, by neutral rights being mutually defined by such recognitions.

CHAPTER IV.

OF THE RIGHT OF NEUTRALS TO TRADE AT ALL
WITH BELLIGERENTS.

It was formerly a question whether a belligerent had not the right to forbid neutrals to trade at all with his enemy; and this degree of freedom, now uncontested, was only gradually established. In the times just preceding the work of Grotius, we are able to follow this question in the process of settlement. In 1551, the Hanse Towns, then at war with Denmark, demanded that the Dutch should not trade with the Danes, but the Dutch replied that they possessed, and should continue to exercise, the right of trading with a belligerent. In 1599, when the Spanish government first forbade the Dutch to trade with Spain, which liberty had been allowed to them from the commencement of the revolt till that time, the States-General issued a manifesto, forbidding the people of any State to carry any merchandize into Spain, and this they publicly notified to all governments, that none might plead ignorance. Henry IV. of France, though then at the height of his power, acceded to the articles of this manifesto, and prohibited his subjects from trading with Spain for six months. But, in 1575, Queen Elizabeth had declared to the Dutch, that she would not allow her subjects to be interrupted in the pursuit of their trade with Spain. Other instances, in which belligerents insisted on the right to prevent all commerce with an enemy, while neutrals insisted on the right to prosecute such commerce, are given by Grotius, who says, that

Formerly
neutral com-
merce was
sometimes
forbidden
altogether.

he can find nothing determined on the subject in the Voluntary Law of Nations. (1)

But this harsh treatment is now superseded.

Since that period, the law of Europe has become quite settled, that neutrals have the right to trade with belligerents, excepting in those cases in which neutral commerce would affect the issue of a war, by interfering so as to assist either party in the contest. The remembrance of the former doubts on this subject is, however, still preserved in the article inserted in most treaties of commerce, agreeing that either party shall have full liberty to trade with the enemies of the other during war, which stipulation was introduced when this right was a subject of dispute, and is continued now when the right is uncontested.

Two exceptions.

Two instances have occurred in which this right has been violated by belligerents: in 1689, the treaty of Whitehall, between Great Britain and the States-General engaged, Art. II., "That if, during the course of this war, the subjects of any other king, prince, or State, shall undertake to traffic, or have any commerce with the subjects of the most Christian King, or if their vessels, or shipping, are met with in their passage to the ports, havens, or roads, under the obedience of the most Christian King; the said vessels, shipping, merchandise, or wares, shall, in the case above mentioned, be attacked and taken by the captains of men of war, privateers, or other subjects of the King of Great Britain, and the Lords of the States-General, and shall, before proper judges, be condemned for lawful prize." (2) This was a violation of neutral rights which no reasoning could justify, and which

(1) See Grotius de Jure, lib. III. c. 1, § 5. Lord Liverpool's Discourse on the conduct of Great Britain towards neutral nations,

p. 26. Hübner de la saisie des bâtimens neutres, I. ch. iv. § 7.

(2) Dumont, Corps Dip. VII. II. 238.

force alone could support, as seems indeed to have been acknowledged by one of the contracting parties, in the bad pun attributed to William III., that this interruption of neutral trade was based on *cannon law*. (1) Sweden and Denmark, from whom some ships had been taken, entered into a treaty, in 1693, for the purpose of maintaining their rights and obtaining satisfaction; and the contracting parties finally did justice to the injured neutrals. (2)

The other instance in which trade with an enemy has been forbidden to neutrals was in the war resulting from the French Revolution, when, in 1793, Great Britain, Russia, Spain, Prussia, and the Emperor of Germany, united in treaties to prevent neutrals "from giving, on this occasion of common concern to every civilised State, any protection whatever, directly or indirectly, in consequence of their neutrality, to the commerce or property of the French, on the sea, or in the ports of France." At a later period occurred those restrictions on the part of both belligerents in which each party endeavoured to prevent all commerce with the other; but these events are treated of in subsequent chapters, to which they more properly belong.

With these exceptions, there has been no interruption to the general rule, that neutrals have the full right of trading with belligerents as in time of peace, excepting those cases when such commerce would interfere with belligerent rights. There is nothing in commerce in general that can be said to affect directly the issue of a war, and with which, therefore, belligerents have a right to interfere. The effect upon the issue of a war that the national wealth accruing from the profits of commerce might produce is too remote to

Neutral trade,
with certain
restrictions,
now uncon-
tested.

(1) Büsch, *Völker-Seerecht*, p. 21. (2) Vattel, liv. III. ch. VII. 112.

justify so great an evil as the suspension of a neutral State's customary trade; and, on the other hand, the insignificance to neutrals of some small portions of their trade, which may yet be vitally injurious to belligerents, justify the latter in some restrictions upon the unlimited freedom exercised during peace. It is to the consideration of such cases that we now proceed.*

[* The question of the possible liability of a neutral government for the trading of its citizens with either or both of the belligerents in the implements or materials of war has been much discussed of late in reference to the sale of ships to the Confederate States upon their insurrection in 1860, and to the constant traffic alleged to have gone on during the Franco-German war of 1870 between English citizens and the French and German governments in rifles and coal. An able review of the opinions of all the chief authorities on the subject, with citations and precise references, will be found in Sir A. Cockburn's "Reasons for Dissenting from the Geneva Award," referred to in a previous note. He correctly sums up the actual rules on the point in the following terms:—"It is perfectly clear . . . that, "with the liability to the seizure and loss of the cargo—"in some instances, it is said, of the ship—if he transmits contraband of war to the enemy of the belligerent captor—and to the loss both of ship and cargo if he attempts to force a blockade—ends, according to the existing practice of nations, all restraints on the trade and commerce of the neutral. In his own country, in his own markets, in his own factories, the neutral may, according to the practice of nations, sell articles to the belligerent which, if sent by sea, would be contraband of war." Sir A. Cockburn justly adds, "Theoretical writers are not, indeed, of one mind on this subject. While the great majority of authors are

[“ agreed as to the rights of the neutral to sell in the
“ way of trade to the belligerent resorting to his market
“ whatsoever the latter desires to buy, if the neutral
“ has it to sell, whether the articles be of an innocent
“ character or contraband of war in its most destruc-
“ tive form, a few authors have recently written in a
“ different spirit.” He then adduces the evidence on
both sides.—ED.]

CHAPTER V.

OF THE "RULE OF 1756," AND OF THE RIGHT OF NEUTRALS TO CARRY ON THE COASTING TRADE OF A BELLIGERENT.*

Claims to
carry on a
trade during
war which had
never been
allowed during
peace.

WE have seen, in a previous chapter, that the difficulty of the questions regarding neutral commerce arises from an apparent collision of right, resulting from the claim of neutrals to carry on all their commerce as in times of peace, while belligerents claim that neutrals shall prosecute no commerce that interferes with the issue of a war. But besides this, there has been, on the part of neutrals, the claim which forms the subject of the present chapter: neutrals have demanded not only to prosecute all the commerce which they carried on in time of peace, but also to carry on a trade which never was allowed to them in time of peace, and which they could only enjoy during war, and in consequence of war.

Exclusive
character of
European
colonial policy.

It was formerly the policy of all European governments to foster their navigation, by giving to their own ships certain exclusive privileges in trading with their

[* In the present era of general free trade and a policy in reference to colonies by which their trade is either left to be regulated by themselves, or is regulated in view solely of their own interests and not of those of the mother country, the rule of 1756 is almost obsolete through having nothing to operate upon. It is, however, historically of the greatest importance, and it is impossible to say that, in a time of temporary commercial retrogression, the occasion for its application might not revive. The study of the rule, especially as illustrated by the judgments of Sir W. Scott, will be found of great advantage to the student. See Mr. Tudor's notes to the case of the *Whitelmia*, in his "*Leading Cases on Mercantile and Maritime Law*."]]

own colonies. In many instances States have allowed no merchant ships but their own to proceed to or from their colonies for any purpose whatever: this was formerly the colonial policy of most, if not of all, European governments; but the strictness of this exclusion has been gradually relaxed, and in most instances, though not in all, ships of foreign nations are now allowed to trade directly to and from their own country and the colonies of other States. But no State has ever so far relaxed its commercial restrictions as to permit other States, in time of peace, to enjoy its carrying trade, so as to allow foreign vessels to carry the productions of the colonies to the mother country, or the productions of the mother country to the colonies.

In the war of 1756, commonly called the Seven ^{"Rule of 1756."} Years' War, the French, finding themselves worsted at sea, and unable, because of our maritime superiority, to carry on their colonial trade themselves, repealed their old exclusive laws, which restricted foreigners from prosecuting the trade between France and the French colonies, and opened this trade to the ships of neutral powers. But Great Britain denied that neutrals could have any right to enter upon such a traffic, which was a direct interference with her maritime rights, as it might enable some colonies to hold out which would otherwise fall into her power; and might enable France to withdraw seamen from her merchant service to man her fleet, who would otherwise have been obliged to be engaged in the colonial trade, or France would have risked the surrender of her colonies. From the time when this rule began to obtain, it has been commonly called the "Rule of 1756," and it may be defined as declaring, that "neutrals are not permitted to engage in a trade with the colonies of a belligerent during war, which is not permitted to foreign vessels during peace."

Statement of
the question by
Sir William
Scott.

During the war with Napoleon I., several cases involving this principle were discussed in the Court of Admiralty, and the treatment of vessels engaged in such traffic became gradually more severe; and, ultimately, the ships engaged in such trade were condemned as good prize, as well as the cargoes which they carried. In giving judgment upon one of these cases, Sir William Scott said, that "upon the breaking out of a war, it is the right of neutrals to carry on their accustomed trade, with an exception of the particular cases of a trade to blockaded places, or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search. * * * * * The general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title, and such I take to be the colonial trade, generally speaking." (1) In this case, the cargo was condemned, but the ship was restored, though without freight: and subsequently, in another case (the "*Minerva*,") the ship was restored; (2) but in a case of appeal to the Lords, in 1801, the ship, as well as the cargo, were condemned on the ground of the illegality of the trade between the mother country and the colony. (3)

Opinion of the
American
chancellor
Kent.

As might have been expected, neutrals have not always readily acquiesced in a rule of practice which,

(1) *The Immanuel*, Robinson's Reports, II. 198.

(2) *Id.* III. 232.

(3) *Id.* 233.

however just, excludes them from profits which they would otherwise enjoy. Subjects of the United States especially have protested against our practice, and have claimed the right to all trade with an enemy except in articles of contraband. But one of their highest judicial authorities, Chancellor Kent, seems to acknowledge the justice of our claims. "It is very possible," he says, "that if the United States should hereafter attain that elevation of maritime power and influence which their rapid growth and great resources seem to indicate, and which shall prove sufficient to render it expedient for her maritime enemy (if any such enemy should ever exist) to open all his domestic trade to enterprising neutrals, we might be induced to feel more sensibly than we have hitherto done the weight of the arguments of the foreign jurists in favour of the policy and equity of the rule." (1)

To me, the "rule of 1756" seems one of the most moderate and unobjectionable of belligerent claims; it is no interference whatever with the right enjoyed by those States during peace, who claim this benefit during war, and it consists merely in preventing neutrals from interfering with the rights of belligerents, and seeking their own emolument at the direct expense of one party in the contest.

But although this rule, as applied to colonial policy, only originated during the war of 1756, yet the same principle had been before discussed as applied to the coasting trade of belligerents; the coasting trade, like the colonial trade, being usually, if not invariably, confined to the subjects of the State that owns the coasts. In 1674, the Dutch, being then belligerents, while the English were neutrals, contended that our treaty with

"Rule of 1756" no invasion of previous rights.

Coasting trade of belligerents.

(1) Kent's Commentaries on American Law (Abdy), p. 229.

them, which stipulated that the ship covered the cargo, did not authorize us to carry on a trade between one enemy's port and another. But in this case Sir William Temple claimed that our treaty warranted our conduct; and in this the Dutch finally acquiesced. (1) Since that time, several treaties have included articles on this question, some permitting, and some disallowing, such traffic. In 1675, the year after the negotiation just mentioned, a treaty between England and the United Provinces declared that such trade between enemies' ports was allowable to the subjects of the contracting parties, whether the said ports belonged to the same sovereign or to two different sovereigns. (2) The same stipulation occurs in the treaty between the United Provinces and Spain, in 1676, (3) and between the United Provinces and Sweden, in 1679. (4) But such trade is forbidden in the treaty between England and Denmark, in 1691. (5) It is, however, again allowed in the treaties of Utrecht, between France and England, and between France and the United Provinces; (6) and in the treaty between the United Provinces and Russia, in 1715; (7) and in that between Spain and the Empire, in 1725. (8) Among more recent treaties, I find that such trade is allowed to either contracting party—in the treaty between France and the United States, in 1778; (9) in that between Sweden and the United States, in 1783; (10) in that between Great Britain and France, in 1786; (11) and in that between Spain and the United States, in 1795. (12) On the other hand, such trade is declared unlawful in the treaty between

(1) Courtenay's *Life of Temple*, I. 422, 424.

(2) Dumont, *Corps Dipl.* VII. i. 319.

(3) *Id.* 325.

(4) *Id.* 439.

(5) *Id.* VII. ii. 295.

(6) *Id.* VIII. i. 248, 380.

(7) *Id.* 469.

(8) *Id.* VIII. ii. 115.

(9) De Martens, *Rec.* II. 598.

(10) *Id.* III. 568.

(11) *Id.* IV. 168.

(12) *Id.* VI. 156.

Prussia and Sweden, in 1762, (1) and in that between Great Britain and Russia, in 1801. (2)

Thus there has been no consistent system in the conventions of States, as even the same States engage to observe a different course of conduct with different parties. The great champion of neutral rights, Hübner, has a curious passage on this question: after saying, that neutrals have a right to trade during war as they had done during peace, he adds, "*bien entendu qu'ils ne sortent point de leur caractère; qu'ils ne trafiquent avec les nations belligérantes que comme en temps de paix.*" The only point which seems uncertain is, he says, the trade of neutrals with the colonies of belligerents, of which it is notorious, that "*les peuples neutres ne le font jamais et n'osent le faire en temps de paix; qu'il ne leur est ouvert qu'en temps de guerre, et à cause de la guerre; et qu'enfin au rétablissement de la paix ils en sont derechef exclus; de sorte que le commerce des sujets d'un souverain neutre avec les colonies d'un état qui est en guerre, paroît être un objet du droit rigoureux de la guerre.* Cependant je ne vois pas pourquoi les sociétés souveraines qui sont neutres *devroient se refuser un bénéfice considérable qui se présente; pourvu qu'elles s'abstiennent de fournir à ces colonies aucune denrée prohibée en temps de guerre.*" (1) This last sentence is rather startling, as Hübner first of all says, that such a trade is not allowable, and then says, that he does not see why neutrals should deny themselves so considerable an advantage. But it is not such an abandonment of principle, for the sake of emolument, that the aggrieved parties are likely to favour or tolerate; and the practice of belligerents has shewn but little grace to those who have acted upon opinions similar to those of Hübner.

Opinion of
Hübner.

(1) De Martens, Rec. I. 39.

(2) *Id.* VII. 272.

(3) De la Saisie des Bâtimens
Neutres, I. ch. iv. § 6.

French rule on
this subject.

By an ordinance of Louis the XIV., in July, 1704, it was declared, art. III., that neutral vessels, laden with goods, the produce or manufacture of States at war with France, and going to any other State than their own, should have these goods seized as good prize: by art. IV., such vessels, laden with such cargoes, going to an enemy's port are also to have these goods confiscated; and by art. VI., neutral ships going from an enemy's port to any neutral state but their own, to be declared good prize with their whole cargoes, although belonging to neutral owners. Precisely the same provisions are made by the ordinance of October, 1744, an exception being made for those States to whom particular treaties allowed a privileged treatment.

Our own
practice.

Thus the French practice has been of the severest character, as regards a coasting trade carried on by neutrals between the ports of a belligerent. Our own practice, on the other hand, has been of the greatest lenity. In the cases with which I am acquainted, such coasting trade has been declared illegal by our courts, (1) but has only entailed the forfeiture of freight, and not the confiscation of the ship, unless there have been false papers on board, when such attempt at fraud has produced condemnation of the ship likewise.

Principles
regulating
conduct re-
garding this
question.

This practice seems to be an abandonment of the strict rights of a belligerent, which may have owed its existence to policy, but which is not demanded by international equity. I hold the opinion of Vattel, that while neutrals "only continue their *customary* trade, they do not thereby declare themselves against my interest; they only exercise a right which they are under no obligation of sacrificing to me." (2) But when neutrals

(1) Valin, *Ordonnance de la Marine*, II. 248-251. See Robinson's Reports, I. 296, and VI.

78 and 255, and IV. App. 1-15.

(2) *Droit des Gens*, liv. III. ch. VII. § 111.

demand to prosecute a trade which was never open to them in times of peace, which will be closed against them as soon as peace is resumed, and to which they are only admitted because it is an advantage to one belligerent, thereby proving that it is an infraction of neutral duties to enjoy such trade, I deem it one of the clearest rights of a belligerent to prohibit such traffic; nor can I see on what ground neutrals can complain of such prohibition, which is no invasion of their former liberty, but which only restrains them from making profits by one belligerent at the direct expense of the other. And I think this principle equally applicable to the colonial and to the coasting trade of belligerents, when such trade has not been open to foreigners during peace.

CHAPTER VI.

OF THE PROPERTY OF AN ENEMY FOUND BY A BELLIGERENT IN THE SHIP OF A NEUTRAL, AND OF THE PROPERTY OF A NEUTRAL FOUND IN THE SHIP OF AN ENEMY.

Statement of
the question.

THE rights and obligations to be discussed in this chapter have occasioned more controversy, and have been debated with greater acrimony, than any other contested question of the Law of Nations. The question is usually summed up in the phrase, borrowed from the Dutch, that "free ships make free goods;" and the controversy proceeds, from the assertors of one side of the question claiming that the property of enemies, found in neutral ships, may be lawfully captured by a belligerent; while the impugners of this doctrine assert, that neutrals have a right to carry the property of a belligerent secure from the capture of his enemy, and that to interfere with this screening of enemies' property is an invasion of neutral rights.*

[* The doctrine "free ships make free goods" is usually associated with another doctrine which defines the liability to capture of neutral goods on board enemies' ships. The assertors on one side of this latter question hold neutral goods to be exempt from capture even if found on board an enemy's ship; while their opponents hold that neutral goods follow the fortune of the ship on which they are found, in other words, that "enemy's ship makes enemy's goods." It will be seen from the history of these several doctrines, as given in the ensuing pages, that the last-mentioned form of the doctrine respecting neutral goods on board an enemy's ship has usually, up to the Treaty of Paris of 1856, been conceded in the interest of belligerents as the price of the admission of the doctrine "free ships make free goods" in the interest of neutrals.—ED.]

The mass of argument which this discussion has produced, has perhaps been occasioned, not so much by the question being one of very difficult solution, as by the important pecuniary advantages to neutrals connected with its decision. For it is to be remarked, that the law of Europe was uniform and unvaried, until the interests of a neutral State first produced an innovation on the established practice ; and that the impugnors of the established law have invariably been either subjects or governors of those States that would derive the greatest benefit from an alteration. One happy consequence, at least, has resulted from the sifting of evidence and collision of arguments occasioned by this discussion,—namely, that this question, which was formerly of some obscurity, is now settled with greater certainty than almost any point relating to the rights of neutrals ; the negative proof of the failure of very able disputants on one side, uniting with the positive weight of the convincing reasoning produced on the other side, so as to make acquiescence in the acknowledged rule as full of satisfaction as the nature of such controversies will admit.

Its great
pecuniary
importance.

[The treatment of the subject must indeed henceforth take a fresh starting-point from the Declaration attached to the Treaty of Paris of 1856, by which the several States, including England, which were parties to the Declaration, and those which have since professed their adhesion to it, bound themselves, in the case of war between each other, to observe the form of the doctrines which is most favourable to neutrals, that is, “free ships make free goods,” except in the case of contraband of war ; but “enemy’s ships do not make enemy’s goods,” except in the case of contraband of war.*]

[* See pp. 157, 278.]

Its claim to great attention.

Thus, at the present day, a rule obtains, being established by treaty between some of the European powers, different from the Law of Nations as Great Britain has ever held it to be established when not excepted from by special treaty. It is also most probable that, in the event of any future war, the claim to screen enemies' goods from capture will continue to be advanced by neutrals; and, in addition to this urgent reason for attention, the historical interest connected with a point so much debated, makes this a question of more than usual consequence to a student in the Law of Nations.

Divisions of the subject.

It will be best to conduct the inquiry by considering,—I. What are the dictates of reason with regard to the right of the question; or, in other words, what are the commands of the Law of Nature?—II. What have been the decisions of the acknowledged authorities on the Law of Nations?—III. How far the Customary, or Conventional, law of Europe has interfered to reverse or modify the law as derived from the two preceding sources.

SECTION I.

The Question considered with reference to the Justice of the Case, or, in other words, with reference to the Law of Nature.

Right of a belligerent on the property of enemies.

I. With regard to the right of a neutral, as derived from reason, to protect the property of a belligerent, on board neutral ships, from capture by the belligerent's enemy: it is undeniable, as a general rule, that an enemy has a right to capture the property of his adversary. This right has been discussed in a previous chapter, and is acknowledged by every writer on the Law of Nations. (1) This right, as we have seen, has

(1) *Vide ante*, p. 181 *et seq.*

been modified by custom in regard to wars by land. As far as right goes, a belligerent, according to the jurists, and according to the ancient practice of Europe, has a complete right over *all* the private property of the subjects of his enemy, even in wars by land. But this right has been gradually modified, and private property, on land, is usually respected by belligerents, as long as requisitions for their troops are complied with. This lenity has, however, been merely introduced by usage. It probably had its origin in its being the interest of conquerors to attempt to reconcile a vanquished nation to a change of sovereignty, according to the maxim, as old as Machiavel, that "men sooner forget the death of their father than the loss of their patrimony." Even at the present day, when a respect for private property on land generally obtains, the right is still exercised whenever a belligerent finds that his convenience demands such violent measures, as in the case of towns given to be sacked; and of forced contributions levied in an enemy's territory.* The rights, then, of a belligerent extend to the private property of the subjects of his enemy; but custom has introduced a lenient application of these rights in wars by land. Now this lenity has *never* been practised in naval warfare. The right over an enemy's property, acknowledged in all cases, has, in naval warfare, been uniformly exercised without any single exception. No government has ever attempted to assert such a claim. In the treaty between Prussia and the United States, in 1785, it was agreed, that such a principle should be acknowledged between these two governments,—no property being seizable in the trading vessels of either

[* It has already been noticed that some of these so-called extreme "rights" of war are gradually ceasing to be recognised as rights at all; and the resort to the practices alluded to can only be retrospectively condoned when the circumstances of the special case seem to present some sort of apology for them.—ED.]

government, and contraband being subject only to detention, not confiscation. But these governments never thought of establishing this immunity as a maritime right, conclusive on other governments, and themselves abandoned this principle in their treaty of 1799. Such a plan was never agitated in the schemes of either of the armed neutralities; and the right to seize the private property of enemy's subjects at sea, in which is concerned so much of the very essence of naval warfare, and the benefit of maritime superiority, is acknowledged by all authorities, and has been constantly practised by all governments.*

Power of a neutral to interfere with this right.

This point regarding maritime capture being determined, the conclusion cannot be resisted, that a power in neutrals to carry the property of a belligerent exempt from seizure by his enemy, would be a direct interference with the rights of belligerents. It is not so much a question, whether a belligerent shall be allowed to interfere with the rights of a neutral, as whether a neutral shall be allowed to interfere with the rights of a belligerent. A neutral's immunity from the effects of war can never be construed so as to extend into depriving a belligerent of his most important rights. (1) The essence of neutrality is the abstaining from all interference whatever—in the words of Hübner, the express

(1) See on this point Lord Liverpool's Discourse on the conduct of Great Britain in respect to neutral powers, p. 10, (2nd ed.

1759,) and Mr. Ward's Treatise on the relative right and duties of belligerent and neutral powers, § 1.

[* It is well known that, though the right here mentioned is incontestable, yet it has been attempted of late years in many quarters to abrogate it. This has been long the persistent policy of the United States, and is much favoured by a certain school of politicians in this country. See an account of the "Marcy Amendment" in Dana's note to Wheaton in reference to Privateering and the Declaration of Paris, Part IV. ch. II. — ED.]

champion of neutral rights, "les peuples neutres doivent rester dans une *entière inaction* par rapport à la guerre et à ses opérations; ils ne doivent secourir directement *aucune* des parties." (1) Now, it is a clear interference with a belligerent's rights, for a neutral to afford that protection to an enemy which he would not enjoy but for that neutral's intervention. So far from being an act of neutrality, it is an act of direct benefit to one, and of direct injury to the other belligerent.

It is the counter-claim of neutrals that, being unconcerned in the contest, they have a right to carry on their commerce as in time of peace. This apparent collision of rights ceases to be a difficulty after a moment's consideration. Rights, perfect under certain circumstances, are subject to the contingency of being affected by other rights. In time of peace it is the right of a people to export all sorts of merchandise to any nation that will receive them; in time of war this right is subject to the exception, that articles of contraband, serving for the direct furtherance of hostile purposes, may not be exported to a belligerent. Again, in times of peace a people may send their ships to any port whatever belonging to another government; in time of war this right is modified in cases of siege or of blockade. And, in the same manner, the right to carry the goods of a second party ceases to be a right when such carriage is an injury to a third party. The rights of a trading nation cease to be rights to themselves when they become injuries to others. In cases of enemies' goods being taken from neutral ships, freight is paid by the captor; so that no injury, or as little as possible, is done to the neutral. On the other hand, if an exemption from capture be granted to goods on board neutral ships, great injury is done to a belligerent. Belligerents

Claim of neutrals to be exempt from any effect from hostilities.

(1) Hübner, I. ch. II. § 8.

only require from neutrals an abstinence from what is noxious, and a right to injure a belligerent can never be justly claimed by a neutral.

Such assistance would chiefly benefit the commerce of the *weakest* power.

It is to no purpose to say that neutrals could afford this immunity equally to both belligerents. It is alike the dictate of plain reason, and the opinion of all writers, including the most eager advocates for the privileges of neutrals, that the essence of neutrality consists, not in assisting both parties equally, but in affording no assistance to either belligerent. (1) But, in the case now under consideration, a violent infraction of neutral duties is evident. The power to protect enemies' goods in a neutral ship does not affect both parties equally; it is chiefly a benefit to the weaker power at sea. Both common sense makes this evident, and history shows that it has always been the power weakest at sea that has desired this protection to its commerce from neutrals. A State powerful at sea is able both to carry on and protect its own commerce. It is the State weakest at sea that has need of such neutral protection from the enemy's cruisers, which her own naval forces are unable to afford. But it is absurd to speak of its being a right of neutrality thus to interfere to paralyze the consequences of victory, and to enable a State to carry on a commerce which her opponent had otherwise destroyed.

Its effect in increasing the naval force of a State so assisted.

Nor is it merely the assistance given to the commerce of the weaker belligerent that would make such protection opposed to the spirit of neutrality. Such interference would involve a direct *increase of the naval forces* of the State so assisted. If a neutral carries for a belligerent, where the belligerent was in the custom of carrying before, the belligerent is enabled to bring the seamen, whose place is so supplied, to increase the

(1) *Vide ante*, p. 223.

number of the seamen in his fleet, and thus to meet his opponent with augmented resources. Every seaman whom the neutral's assistance enables the belligerent to withdraw from his commerce, is disposable for the manning of that belligerent's fleet. It is impossible to include the exercise of a power involving such consequences among the rights of neutrality. If the neutral did not interfere, the belligerent must do one of two things; either he must leave his fleet weaker, in order to prosecute his commerce and continue his revenue, or he must sacrifice part of his commerce and of his revenue, in order to obtain seamen for his fleets. And here again it must be remarked, that such increase of naval forces being open to both belligerents, is not to the purpose. If it is an interference at all, it is an infraction of neutrality; and who can deny that it is an interference? And it is an interference not affecting both parties equally, but chiefly benefiting the weaker maritime power, who alone desires such assistance; yet it has been spoken of as the maritime tyranny of Great Britain, that such pretensions should not be allowed among the rights of neutrality.

It remains to consider one more position, which has been much relied on by writers who have claimed that the flag of a neutral shall protect the goods of a belligerent. The argument is based on the fact that a belligerent has no right to capture the property of his enemy, when in the territory of a neutral. It is asserted, that a ship is part of the territory of the State to which she belongs: and that goods on board a neutral ship, are therefore as exempt from capture, as if they were actually in the neutral country itself. To argue that a neutral ship is neutral territory is a fiction so palpable, that it appears surprising that it should ever have been insisted on as a tenable position, especially as only one argument is adduced in support

Whether merchant ships at sea are part of the State to which they belong.

of this *territoriality* of ships at sea. The jurisdiction of the State to which a ship belongs extends to the cognizance of acts committed in that ship while at sea: and it is argued that this continuance of jurisdiction proves that a ship at sea is part of the territory to which she belongs. This deduction seems, in the first glance, far-fetched, and too flimsy to be made the basis of any serious conclusions. But, more than this, it meets with contradiction on its own terms: a ship, say the assertors of this proposition, is part of the State to which she belongs, as is evident, because at sea she is subject to its jurisdiction. Now, no nation has jurisdiction over the territory of another nation. But as soon as a merchant ship comes into the harbour of a State to which she does not belong, she becomes subject to the jurisdiction of this latter State. This shows that a merchant ship cannot be considered part of the territory of her State; for if she possesses this character at any time, she must possess it at all times. The fact of a ship at sea being subject to the jurisdiction of her State, is a most reasonable and advantageous regulation: if not amenable to the jurisdiction of their own State, to whom would the crews of ships at sea be answerable? And if they were amenable to no tribunal, the sea would be a place where every crime might be committed with impunity. But it is difficult to imagine how it can be deduced as a consequence from this, that a ship is part of the territory of her State. The fiction is completely destroyed by the disproof above alleged, but other reasons combine to show how little tenable is this position. If a ship be part of her State's territory, it cannot be allowed to take from her contraband of war going to an enemy; because such capture would not be permitted if the contraband goods were lying in the neutral territory. Again, if neutral ships carry the soldiers of our enemy, it would not be allowable to make them prisoners, because we

must not attack the territory of a neutral. Either the argument is worth nothing originally, or it holds to this extent, which is a *reductio ad absurdum*. To escape contradiction, the right of search, and of seizing contraband, must be denied, if the right to protect enemy's goods be claimed on this ground.

This is a short, but, it is very earnestly hoped, impartial statement of the arguments on this question, as far as it depends on the deductions of reason, or, in other words, on the Law of Nature. It has been shown how groundless is the accusation that, to prevent neutrals from screening enemy's property is an invasion of neutral rights. No restraint is placed on neutral commerce, as far as neutrals themselves are concerned. They are at full liberty to trade with belligerents *on their own account*, as in times of peace; to purchase any merchandise in a belligerent's country; and to carry all their own produce and manufactures, excepting contraband, to a belligerent. All that is denied them is a power to interfere with the rights of a belligerent. In the words of Mr. Ward, neutrals are at liberty to trade *with*, but not *for*, a belligerent. One chief purpose of maritime warfare is the destruction of the commerce of the enemy. The claim of neutrals to protect enemy's goods on board their vessels would directly frustrate this purpose. It would be an interference with a belligerent's rights, and, so far from being a right of neutrals, it would be a violation of the duties of neutrals. It may be said, in conclusion, although the assertion is a strong one, that neutrals, if possessed of this protecting power, would, in many cases, do more harm to a belligerent than if they were actually his enemies. If, for instance, Denmark, the State that has been most eager in these pretensions, had, in a maritime war in which Great Britain was engaged against the continental powers, the privilege

Summary of
the above
arguments.

of carrying on the commerce of those States, with exemption from our capture, she would do us much more injury than if actually our enemy. In the latter contingency, the number of our enemies would receive an addition which would be little felt by us: while, on the former supposition, an assistance would be given to our enemies that would incalculably augment their resources, and increase the amount of force which they might bring to the encounter. Even the real instigator of all these pretensions, interest, would fail to be on the side of such neutral claims; for, if these were allowed among the rights of neutrals, no powerful belligerent would allow a small State to remain neutral in a maritime war: a declaration of war would be among the necessary measures of self-defence.*

[* In spite of the validity of the reasons alleged in this section for the actual immunity of neutral goods from seizure on board belligerent vessels, independently of treaty, it cannot be disguised that the whole bent of modern policy is in this direction, and that England, at any rate, is, by the Declaration of Paris, irretrievably committed to such a course. Occasional efforts are made (the last of which was by a motion in the House of Commons on April 13th, 1875, by Mr. Baillie Cochrane) to induce England to withdraw from her part in the Declaration, on the ground that it was made by the government of the day without communication to the House and without any sort of public discussion, and that its operation was directly opposed to the interests, and even the safety, of England. Apart from the political inexpediency, or rather injustice, of a government renouncing an engagement publicly, even though informally, entered into, and thereby disappointing the expectations of those States which may have for years regulated their conduct with reference to the continuing validity of the engagement, there are many arguments capable of being adduced in favour of recognising the immunity of neutral goods (except contraband of war) on board belligerent vessels as sanctioned by the Declaration. In the first place, the increased number of wealthy States at the present day, when compared with past times, and the greatly pacific habits of most of them, render the inconvenience inflicted by the obstruction of neutral commerce, and by mistakes in the execution of the law, inordinately greater and more widespread than ever it was before. In the second place, the use by neutrals of the merchant vessels of belligerents, subject to their liability

SECTION II.

The Opinions of the Authorities on the Law of Nations with regard to this Question.

The next consideration is, what have been the decisions of the European law, as declared in the writings of those eminent jurists whose inquiries were directed to the elucidation of Right between Nations; whose writings have been recognised by all governments, if not as the exact measure of justice, at least as the surest guides to its discovery; and whose works must ever retain the value which first attached to them, from their claims to reference as containing the demonstration of what equity commands.

Value of such an inquiry.

The law first examined, will be one of which the influence was of great extent, as respects the numbers whom its authority controlled, as well as of long duration in its action; but of which the authors or compilers are now unknown, while the date of its promulgation is equally lost in antiquity. The very ancient laws of the Rhodians, the earliest maritime code extant, make no mention of this question; but the maritime code next in point of time, though with the interval of at least ten centuries, is explicit in its declarations on this question.

The decision of the *Consolato del Mare*.

to capture and the consequent interruption of the voyage, is a not inadequate compensation for the loss inflicted on neutrals by the blockade of ports and by arbitrary extension on the part of belligerents of the list of articles treated from time to time as contraband of war. In the third place, the attitude of England as that of the only power whose permanent interest it must be to adopt the severest rules against the use of belligerent vessels by neutrals, her own mercantile marine being so enormous and her own wars always likely to be largely maritime, was becoming untenable in the face of united Europe. In the last place, the circumstances attending the Declaration of Paris were that England did not make so large a concession to the claims of neutrals without obtaining a corresponding or even enhanced advantage to herself by the abolition of privateering.—ED.]

The following is the law referred to, as translated from the celebrated *Consolato del Mare*. (1)

Ch. CCLXXIII. § 1. "If an armed ship, or cruizer, meet with a merchant vessel belonging to an enemy, and carrying a cargo the property of an enemy, common sense will sufficiently point out what is to be done; it is therefore unnecessary to lay down any rules for such a case.

§ 2. "If the captured vessel is neutral property, and the cargo the property of enemies, the captor may compel the merchant vessel to carry the enemy's cargo to a place of safety, where the prize may be secure from all danger of re-capture, paying the vessel the whole freight which she would have earned at her delivering port; and this freight shall be ascertained from the ship's papers; or, in default of necessary documents, the oath of the master shall be received as to the amount of freight.

§ 3. "Moreover, if the captor is in a place of safety, where he may be secure of his prize, yet is desirous to have the cargo carried to some other port, the neutral vessel is bound to carry it thither; but, for this service, there ought to be a compensation agreed upon between them; or, in default of any special agreement, the merchant vessel shall receive for that service the ordinary freight that any other vessel would have earned for such a voyage, or even more; and this is to be understood of a ship that has arrived in the place where the captor may secure his prize, that is to say in the port of a friend, and going on an

(1) Copied from Sir C. Robinson's "Translation of the chapters CCLXXIII. and CCLXXXVII. of the *Consolato del Mare* relating to Prize Law." London, 1800, without the author's name. •

“ ulterior voyage to that port, to which the captor wishes
“ her to carry the cargo which he has taken.

§ 4. “ If it shall happen that the master of the
“ captured vessel, or any of the crew, shall claim any
“ part of the cargo as their own, they ought not to be
“ believed on their simple word; but the ship’s papers
“ or invoice shall be inspected; and in defect of such
“ papers, the master and his mariners shall be put to
“ their oaths; and if, on their oaths, they claim the
“ property as their own, the captor shall restore it to
“ them, regard being paid, at the same time, to the
“ credit of those who swear and make the claim.

§ 5. “ If the master of the captured vessel shall
“ refuse to carry the cargo, being enemy’s property,
“ to some such place of safety, at the command of the
“ captor, the captor may sink the vessel if he thinks fit,
“ without control from any power or authority whatever,
“ taking care to preserve the lives of those who are in
“ her. This must be understood, however, of a case
“ where the whole cargo, or at least the greater part, is
“ enemy’s property.

§ 6. “ If the ship should belong to the enemy, the
“ cargo being either in the whole, or in part, neutral
“ property; some reasonable agreement should be
“ entered into on account of the ship, now become
“ lawful prize, between the captor and the merchant
“ owning the cargo.

§ 7. “ If the merchants refuse to enter into such an
“ agreement, the captor may send the vessel home to
“ the country whose commission he bears; and, in that
“ case, the merchants shall pay the freight which they
“ were to have paid at the delivering port; and if any
“ damage is occasioned by this proceeding, the captor

“ is not bound to make compensation, because the
 “ merchant had refused to treat respecting the ship
 “ after it had become lawful prize; and for this further
 “ reason also, that the ship is frequently of more value
 “ than the cargo she carries.

§ 8. “ If, on the other hand, the merchants are
 “ willing to come to a reasonable agreement, and the
 “ captor from arrogance, or other wrong motives,
 “ refuses to agree, and forcibly sends the cargo away,
 “ the merchants are not bound to pay the whole, nor
 “ any part of the freight; and, besides, the captor shall
 “ make compensation for any damage he may occasion
 “ to them.

§ 9. “ If the capture should be made in a place where
 “ the merchants have it not in their power to make
 “ good their agreement, but are nevertheless men of
 “ repute and worthy to be trusted, the captor shall not
 “ send away the vessel without being liable for damage;
 “ but if the merchants are not men of known credit,
 “ and cannot make good their stipulated payment, he
 “ may then act as above directed.”

Authority of
 the *Consolato*
del Mare.

Such are the provisions of this valuable maritime code, which contained, on the authority of Grotius, the constitutions of the Greek and German Emperors, of France, Spain, Syria, Cyprus, the Balearic Isles, the Venetians and the Genoese; and which, after thus combining the assent of what were the principal maritime States at the time of its compilation, is still, at the distance of perhaps seven centuries, appealed to as an authority. (1) Its decisions on the topic now under consideration are doubly valuable, from the proof they give of what was then the law recognised by the prin-

(1) *Vide ante*, p. 15.

cial maritime States of Europe, and from the presumption they afford that the rule observed by this country, coinciding with the above provisions except when it is less severe, must be agreeable to equity, which could alone have preserved the authority of the *Consolato* through the interval of so many centuries.

The maritime compilations succeeding the *Consolato del Mare* contain no provisions upon this question. The laws of Oleron and of Wisbuy, both probably composed in the thirteenth century, and the laws of the Hanse Towns, published in 1597, are silent on the law of prize. (1) There are treaties and royal proclamations of this interval extant, which show that the rule as laid down in the *Consolato* was the practice of Europe during this period; but these belong to the ensuing section, and we must proceed, with the chasm of many centuries, without any authorities between the time of the *Consolato del Mare* and the date of the earliest writers on the Law of Nations.

The subject not mentioned in other maritime codes.

Albericus Gentilis is, I believe, the first writer who has treated of this subject. His position, as well as his character, makes his testimony unsuspected. He was professionally retained by the Spanish Court to advocate the interests of Spanish subjects, in maritime causes, at a time when this country was neutral during the war between Spain and the Low Countries, and his work now referred to takes its title from the official character of its author. It is remarkable that, although his opinion is given quite decisively in favour of the rule as now acknowledged by this country (independently of special conventions), he does not treat of this question directly, but merely states his opinion

Opinion of Albericus Gentilis.

(1) See Sir C. Robinson's translation of the *Consolato*, postscript, pp. 19, 20, and also the General treatise of the Dominion

of the Sea, &c. where these laws are inserted at length; [and Pardessus, tome II.]

incidentally. He had the problem for solution, whether freight was, or was not, to be paid by the captor of Turkish goods, taken by the Tuscans from an English vessel. Gentilis says that the freight must be paid, and only states incidentally, speaking of the enemy's goods passing to the belligerent captor from the neutral vessel, "*transeunt res cum suâ causâ.*" "The victor," he says, "succeeds to the place of the vanquished; now the vanquished were bound for the freight, for which the cargo was pledged; the captor therefore, in making the prize, must take what was Turkish, namely, the cargo after the freight had been paid." (1) This is as complete evidence as can be desired, of what was considered the law of Europe at the time Gentilis wrote, the rule not being discussed, but merely noticed in passing, as a thing uncontested.

Opinion of
Grotius.

Grotius, likewise, does not discuss this question at length. In treating of commerce to be allowed between an enemy and a neutral, he mentions the provisions of the *Consolato* above recited, and says they contained the constitutions of the maritime States there enumerated. Such a conjunction of authorities appears to have been deemed by Grotius sufficient, in a case where no claims such as have since been advanced were known. He gives instances, from the histories of Holland and of Denmark, in which this rule had been observed; and then adds, that the French had formerly given a facility to neutral commerce, "*adeo indiscrete, ut hostes sæpe sub alienis nominibus res suas occul-*

(1) *Hispanicæ Advocacionis*, lib. I. c. XXVIII. [See also Professor Holland's Inaugural Lecture on Albericus Gentilis (1874, Macmillan), in which he quotes (p. 32) a passage from the same treatise (lib. I. c. XXI.), exhibiting Gentilis' general aspect of mind in respect of neutral claims. "*Jus commerciorum æquum est, at hoc æquius, tuendæ salutis. Est illud gentium jus, hoc naturæ est. Est illud privatorum, est hoc regnorum. Cedat igitur regno mercatura, homo naturæ, pecunia vitæ.*"—ED.]

taient." "This liberty," he says, "had since been checked by edicts which restricted neutrals to commerce in which they employed their own ships, their own seamen, and their own merchandise." Grotius then proceeds to the consideration of whether any commerce at all with an enemy is to be allowed to neutrals; for such were the "neutral questions" of the time of Grotius. The claim to carry on the commerce of an enemy, when he was unable to carry it on himself, was never contemplated at that period; the seizure of an enemy's property on board a neutral vessel is mentioned incidentally, as a right uncontested; and regulations which allowed the escape of such property are blamed as indiscreet, and mentioned as having been rescinded accordingly.

In a subsequent chapter, Grotius says, that property found in the ship of an enemy is not to be treated as the property of an enemy, although being found there affords a *presumption* that it is enemy's property; but this *presumption* may be overruled by *proof*. "Nor," he adds in a note, "are the ships of neutrals carrying the goods of an enemy to be made prize, *unless this had been done with the consent of the owners of the ship*." Thus, so far from contemplating that neutral ships should exempt hostile goods from capture, Grotius thought it necessary to state, that the carrying such goods ought not to subject the neutral ship to capture, unless her owners knew of the transaction; and then, apparently, he would even allow the confiscation of the ship for engaging in such traffic. Thus the opinion of Grotius coincides with the practice of this country, except where he is more severe on neutral vessels. (1)

Similar is the testimony of the immediate successor of Grotius, Zouch, who wrote in 1650, and who, Opinion of Zouch.

(1) De Jure, lib. III. c. I. note 4, and lib. III. c. VI. § 6, and note.

mentioning the French law that enemy's cargo confiscates a neutral vessel, says, "æquius tamen est, ut amicorum naves, ablatis tantum mercibus (nisi prohibitas deferant) dimittantur; et per consulum maris, quo Mediterraneum jus continetur, qui in amicorum nave hostium bona deprehendit, pro eo itineris quod navis præstitit, nauticum solvere tenetur." (1)

Opinion of
Loccenius.

Contemporary with our countryman Zouch, was the Swedish professor Loccenius, who wrote in 1651, and who, like the preceding authors, mentions the right now discussed while contending on another point: like them he claims this treatment of neutrals as a mild measure, while deprecating the custom, then occasionally resorted to, of confiscating the neutral ship that carried an enemy's cargo. He, however, asserts the justice of such confiscation, if the goods are known to be enemy's property by the owners of the ship. Goods in an enemy's ship are to be presumed enemy's property until the reverse is proved; but if this can be done, they are to be released: and, in the same manner, with regard to enemy's goods on board a neutral vessel, "res ipsæ solæ, non naves, in prædam veniunt." (2)

Agreement of
all the above
authorities.

Such were the opinions of the authors who wrote at the period when the Law of Nations became established as a science in Europe. A civilian in the service of Spain, a Dutch jurist resident in France, an English judge of Admiralty, and a Swedish professor of jurisprudence, these are the authorities that combine to establish the law as declared in the *Consolato del Mare*. Other authors with the same opinions might be cited, (3) but these are sufficient to prove that the rule, which in the twelfth century had been recognised as the law of

(1) *Juris et Judiciæ Feccialis*, val. lib. II. c. IV. § 11.
&c. P. II. § VIII. 6.

(2) *De Jure Maritimo et Na-*

(3) Zuarius and Voet are quoted
by Lord Liverpool.

Europe by the chief maritime States, was regarded by the institutors of the science of the Law of Nations as coincident with the principles of equity; and this opinion is declared in a summary manner, that shows that these authors looked upon the position as indisputable. (1)

The interval between the first writers on the Law of Nations, in the middle of the 17th century, and the great jurists who wrote at the beginning of the 18th century, is destitute of writers of much authority; and none have been discovered who thought of opposing the rule as declared in the *Consolato*. One writer of this period, Molloy, is still occasionally referred to on maritime questions, and the value which was placed on his work, at least in our own country, is attested by the numerous editions which were published between its first appearance, in 1682, and 1769. (2) He says, "If the goods of friends are found in the ships of enemies, this does not, *ipso facto*, subject the same to be prize by the Laws of Nations; though it be a violent presumption, and may justly bear a legal examination, till which there may be a securing of the prize, till adjudication shall pass. So, on the other hand, if the ships of friends shall be freighted out to carry the goods of enemies, this may subject them to be prize, especially if the goods shall be laden aboard by the consent or privity of the master or skipper; though in France they have subjected and involved the innocent with the

Opinion of
Molloy.

(1) Pufendorf does not treat of the question of "free ships free goods." A letter from him to Groningius has been published, relating to our treaty of 1689, which prohibited all trade whatever with France, but it does not touch on the subject now under consideration. For the letter and

some excellent remarks on it, see Ward's Treatise, 60—67.

(2) Kamptz, in his *Neue Literatur des Völkerrechts*, p. 177, gives 1682 as the date of the first edition; the copy before me is of the 6th edition, dated 1707. A 9th edition was published in 1769.

nocent, and made both of them prize." (1) This agrees with the opinion of Loccenius above quoted, and is as far as possible from the claim of "free ships free goods."

Opinion of
Heineccius.

The writer next to be quoted is Heineccius. He is one of the highest authorities that could be cited on either side of the question. He was equally remarkable for his great learning, and for the powerful understanding which he employed in deducing conclusions from his materials; and he brought the spirit of a philosopher to the consideration of law. He was a writer on morality as well as on jurisprudence, and he was above the suspicion of any influences which might bias the correctness of judgment which his education so qualified him to attain. If weight be due to any authority, it is to that of Heineccius: and it is thus that he expresses himself, in his excellent treatise on maritime captures, published in 1721. Stating that the goods of a friend, found on board the ship of an enemy, ought to be released; he adds, "*idem statuendum arbitramur, si res hostiles in navibus amicorum reperiantur. Illas capi posse, nemo dubitat, quia hosti in res hostis omnia licent, eatenus, ut eas ubicunque repertas sibi possit vindicare.*" (2)

Opinion of
Bynkershoek.

Shortly subsequent to the treatise of Heineccius, appeared the work of Bynkershoek, who, however, composed his chapters on maritime capture, as he expressly tells us, before he had seen the essay of Heineccius. His arriving at the same conclusions, independently of his contemporary's suggestions, makes his authority the more valuable, especially as his mental character was directly in contrast to that of Heineccius. He had not the refinement, nor the love of pursuing abstract sugges-

(1) Molloy, de Jure Maritimo et Navali, book I. c. I. § 18.

(2) Heineccius de Navibus ob

vectarum vetitarum Mercium Commissis, c. II. § IX.

tions, nor the habit of systematizing from collected facts, which distinguish the latter writer. His characteristic was what is called common sense, possessed in its fullest extent. He was a powerful reasoner, who always seems to possess a complete mastery of all the bearings of his subject, and who makes his reader fully comprehend the steps which had produced conviction on his own mind. Of such a writer, the authority seems a sort of complement to the opinion of the philosophical Heineccius; and the judgment of both is identical in its purport, and similar in the decisive manner in which it is pronounced. Bynkershoek dedicates two chapters of his *Quæstiones Juris Publici*, published in 1737,(1) to the consideration of the property of friends found in the ships of enemies, and of the property of enemies found in the ships of friends. With regard to the former, he dissents from the old French maxim "que la robe de l'ennemi confisque celle de l'ami," and agrees with the rule, that the enemy's ship is lawful prize, but that the neutral property is free. "Cape, si potes, quodcunque est hostis tui, sed mihi redde quod meum est, quia amicus tuus sum, et impositione rerum mearum nihil sum molitus in necem tuam." (2)

With regard to the second question, respecting the property of enemies found in the ships of friends, Bynkershoek says there is the twofold consideration, whether the carrying such property confiscates the neutral ship, and whether the neutral ship protects such property from capture. The old French law made the carriage of enemy's property penal, to the extent of confiscating the neutral ship; and we have seen above that Grotius, Loccenius, and Molloy, held that carrying such goods, if their character were known to the master of the vessel, entailed the capture of the ship. Bynkershoek examines this opinion, and asserts as his conclusion, that taking the

(1) Ompteda, II. 420.

(2) Bynkershoek, Quæst. Jur. Pub. lib. I. c. XIII.

goods of the carrier's friend on board, is not an offence against the Law of Nations, although that friend be in a state of hostility with a third party.

With respect to the other inquiry, whether the property of enemies, found in the ships of friends, be liable to seizure as lawful prize, he says, "*quid, inquires, dubitabis, cum recte occupem, quicquid hostium est?*" But there have been treaties, he adds, in which the principle of "free ship free goods" has been agreed upon, and some of these were with the King of France. With regard to these he makes the observation "*igitur dicendum est, aut ab antiquo jure Francico, de quo supra dixi, plane esse recessum, aut, quod est verius, hæc pacta exceptionum loco esse habenda.*" He proceeds to say, that however this may be, "*de ipsâ ratione, magis quam de pactis, laborandum est.*" In this view, he says, "I cannot perceive why it should not be lawful to capture hostile property, although found in the ship of a friend; for what is taken is the property of an enemy, which falls to the victor by the right of war. If you object that I cannot rightly take possession of hostile property, on board the ship of a friend, without first taking possession of the neutral ship, and that I thus offer violence to the property of a friend in order that I may capture the property of an enemy, and that this is no more allowable than to attack an enemy in the port of a friend, or to ravage a friendly country,—I wish you to remark that it is allowable to stop the ship of a friend, so far as to ascertain whether it be really the ship of a friend, not from the flag, which may chance to be deceptive, but from the ship's papers themselves. If it be proved to be the ship of a friend, I release it; if it be the ship of an enemy, I take possession. Now, if this is allowable, and by every law it is allowable, and is constantly practised, it will also be allowable to examine the papers which relate to the cargo, and thence to ascertain whether any hostile

property be on board the vessel, and if there be such property on board, what should prevent my taking possession of it by the rights of war?" (*quidni ea jure belli occupem?*) (1) Bynkershoek then proceeds to inquire whether freight should be paid by the captor; but this, though allowed, as he remarks, by the *Consolato*, by Albericus Gentilis, and by Zouch, he does not think should be granted. In this alone he differs from the practice which allows freight to the neutral vessel.

This judgment of Bynkershoek, besides its own intrinsic value, is remarkable from the manner in which he anticipates the exact objections made by some of the modern claimants for additional privileges to neutrals. To their demand, that a ship should be considered as part of the State to which she belongs, he replies in a manner that makes it surprising that such a fallacy should have been re-asserted after such a refutation. To their other chief point of reliance, that treaties have established a law contrary to that which previously existed in Europe, he replies, that these treaties form not the rule, but the exception: and, let it be remembered, the treaties chiefly relied on had been made before the time when Bynkershoek wrote. And by whom was this opinion, expressed with such undoubting confidence, given? By a Dutch jurist, writing in Holland, president of the senate of Holland, and in the height of his reputation. A member of the country which had introduced, by treaties, an alteration in the old law of Europe, an alteration which had for years been made the chief object of the diplomacy of the Dutch, to whom, when obtained, it was the source of such ample profits,—he perceived that this privilege must be obtained as a favour, and could not be claimed as a right; and having formed this opinion, he declared

(1) Bynkershoek, *Quest. Jur. Pub. lib. I. c. XIV.*

it in a manner that is in itself a sufficient comment on his political integrity.

Uniformity of all authorities till the middle of the 18th century.

Thus we have traced the Law of Nations on this topic, as declared by the standard authorities, till nearly the middle of the 18th century. During the whole of this period, no single writer had attempted to claim for neutrals greater privileges than were allowed in the *Consolato*. Treaties had been made between some European States, in which the power to carry enemy's goods free from capture, in neutral ships, was granted; the counter-stipulation being always made, that of such powers, being neutral, the goods, when found in an enemy's vessel, should be liable to confiscation. Treaties of the opposite description were also made at the same period; the same State occasionally engaging in one set of stipulations with one State, and in another set of stipulations with another State. These treaties it will, however, be most convenient to consider in the ensuing section, in order not to interrupt the present examination of the opinions of the acknowledged authorities on the Law of Nations. Among these must not be omitted the opinions of those eminent lawyers who discussed the celebrated Prussian Memorial of 1752,—with which we arrive at the first occasion on which the power to protect enemy's goods in neutral vessels was demanded as a right, when not claimed under special treaty; it being acknowledged by the most eager assertors of the claims of neutrals, that, until this period, the whole weight of authority on this question went to shew that enemy's property in neutral ships was the subject of lawful confiscation.

Discussion resulting from the Silesian loan.

In 1742 Silesia was ceded to Prussia, by the treaty of Breslau; by the 7th article of which the King of Prussia made himself responsible for a loan of money advanced by British capitalists in 1735, on the security

of the revenues of Silesia. In 1744 a war broke out between France and Great Britain, in the course of which several merchantmen belonging to Prussia, then neutral, were brought in for adjudication by the British Admiralty, as laden with contraband, or having enemies' goods on board. Some of these ships had part of their cargoes condemned, some were released, and some had an indemnity awarded them for unjust detention. Complaints arose among the Prussian merchants regarding the proceedings of our Admiralty; and in 1751 the King of Prussia issued a commission, appointing certain officers for the examination of the alleged grievances of Prussian subjects, and requiring their opinion whether he would be justified in withholding the money due to the British on the Silesian loan, and in appropriating these funds to the indemnification of Prussian subjects suffering from British capture, supposing such capture to have been unlawful. (1)

The report of the Prussian Commission, delivered in 1752, was divided into six sections, considering, I. The right of search; II. The taking enemy's goods by British cruisers from Prussian vessels; III. The injury sustained by the long detention of Prussian goods, laden on board the ships of other neutrals brought to England for adjudication; IV. The nature of contraband; V. The jurisdiction of the British Admiralty in cases of Prussian vessels; and VI. Whether the King of Prussia had a right to apply the funds in his possession, due to British subjects, to the indemnification of Prussians suffering from British capture. The affirmative reply to the last proposition caused the whole memorial to be transmitted to the British Ministry, as an "exposition des motifs fondés sur le

Report of the
Prussian com-
mission.

(1) The correspondence, and other papers, relating to this discussion, are found in the "Causes

Célèbres du droit des Gens," by M. Charles de Martens, vol. II. cause première.

droit des gens," which had determined the King of Prussia to that resolution. In this country the memorial was submitted to a commission of eminent legal officers, who composed a reply, discussing the several propositions above enumerated; and the result of their inquiry was forwarded, with a letter from the Duke of Newcastle, to the Prussian Legation in London.

With regard to the two memorials, it may be stated, without reference to the right of the case, that seldom has a document issued from an European government evincing such remarkable ignorance of the Law of Nations, as the memorial of the Prussian government; while, on the other hand, the British report was a masterly state-paper, evincing that power of applying the principles of universal right to individual instances, which characterised the mind of one of the memorialists, Lord Mansfield. Still, although wrong in their positions regarding International Law, the Prussian subjects appear to have had cause for complaint in some of the details of their claims; especially in the declaring contraband, by the British Admiralty, materials for ship-building, after the British minister had expressly stated, on the inquiry of the Prussian envoy, that such articles would not be regarded as contraband. (1) Reparation was, in fact, ultimately made, four years after the discussion had commenced, by the British government agreeing, by the treaty of Westminster, in 1756, to pay 20,000*l.* in liquidation of all claims from Prussian subjects; the King of Prussia agreeing, on his part, to fulfil his engagements with regard to the Silesian loan. (2)

Examination
of the Prussian
memorial.

It is with the second proposition of the Prussian memorial that we are alone concerned at present, the other questions being considered in different parts of

(1) *Causes Célèbres*, II. p. 4.

(2) *Id.* p. 87.

the present treatise. The assertion of the Prussian commissioners, regarding the seizure of enemy's goods in neutral vessels, is so remarkable, that it may be as well to quote their own words: They say, "*cette conduite est non seulement contraire au droit des gens, mais aussi à tous les traités qui jamais furent conclus entre des puissances maritimes.*"(1) It requires a large charity to attribute such assertions to no worse an origin than ignorance. The latter of the two clauses would be contradicted by the most superficial student in diplomatic history, and the former, we have seen, had not as yet been sustained by any single writer on the Law of Nations, and was contradicted with the confident expression "*nemo dubitat,*" by one of the first authorities on the subject, with whose writings it cannot be doubted that the memorialists must have been acquainted, the *Prussian* counsellor of state, Heineccius. The right said to be founded on universal maritime convention, is only supported by the Prussians with three quotations from treaties; the right as dependent on *à priori* deductions from equity, is claimed, I. Because Prussian subjects having a right to trade at all with France, have a right to all trade, of every description, whether on Prussian account or on commission. This pretension, that if neutrals have a claim to any trade they have a claim to all trade whatever, would obviously legalise the carrying of contraband, which is a *reductio ad absurdum*. II. By a commerce of this description, the Prussians would do no harm to the British. That they would do great injury by assisting a belligerent in this manner, has been shown in the first division of this subject; (2) and in that division has also been considered the IIIrd pretension of the Prussians, that neutral ships are to be regarded as neutral territory, and that goods on board neutrals are therefore free from the capture of a

(1) *Causes Célèbres*, II. p. 25.(2) *Vide ante*, p. 274.

belligerent. (1) The IVth and last claim of the Prussians was based on the declaration of the British minister, that Prussian commerce was to be free as in times of peace. This declaration was the phrase constantly used with regard to neutrals, and *never* meant to imply that enemies' goods were to be free from capture in neutral vessels. Neutrals were at liberty to *trade for themselves* as in times of peace; to *trade for an enemy* was a privilege never thought of being conceded under this declaration. That this is no forced construction, and that it was so understood by the Prussian government itself, will be made evident from two considerations. First, a language similar in import to the above, is used in treaties where the claim that "free ships make free goods" is expressly denied. In our treaty with Sweden, in 1661, it is declared, art. XI. that "it is by no means to be understood that that confederate, with his subjects and inhabitants, who is not a party in war, shall be denied the *liberty of trade and navigation* with the enemies of that confederate who is involved in such war." * * * * *

"But it shall be lawful for either of the confederates, and his people or subjects, to trade with the enemies of the other, and to carry them *any merchandise whatsoever*, excepting what is above excepted, (articles of contraband,) *without any impediment*." This is as nearly as possible parallel in signification to the declaration that trade was to be free as in times of peace; but that no pretension to cover enemies' goods was understood by this stipulation, is proved by the next article, the XIIth, which provides, that, lest this "free navigation should be carried on to the prejudice of the other confederate, and *lest the enemies' goods and merchandise should be concealed under the disguise of the goods of friends*, it is stipulated, that all ships," &c., are to be furnished with passports according to subjoined formularies. (2)

(1) *Vide ante*, p. 275.

(2) Chalmers' Treaties, I. 52, 53.

In the same manner, in our treaty with Denmark, in 1670, it is agreed, art. XVI., that "it shall be lawful for either of the confederates, and their subjects or people, to trade with the enemies of the other, and to carry to them, or furnish them with *any merchandise* (prohibited only, which they call contraband, excepted) *without any impediment*, unless in ports and places besieged by the other." But that this also, which so nearly resembles the declaration to the Prussian minister, never conveyed the privilege now debated, is evident from the XXth art., which declares that "lest such freedom of navigation * * * * may be to the prejudice of the other ally, and *goods and merchandise belonging to the enemy may be fraudulently concealed under colour of being in amity*," &c., all vessels are to carry certificates according to the forms annexed. (1)

Secondly, that the expression was not understood by the Prussian government to convey the privilege of covering enemies' goods, is proved by the letter of the Prussian minister, Andrié, to whom the declaration from our minister was made, and by whom it was forwarded to his court. He wrote to the King of Prussia, "your Majesty's subjects ought not to load on board neutral ships *any goods really belonging to the enemies of England*, but to load them for their own account, whereby they may safely send them to any country they shall think proper, without incurring any risk." The authenticity of this letter was certified by another Prussian minister, M. Michel, when it was produced in a court of justice in England; (2) and thus it is shown that the Prussian attempt at innovation was not supported even by the pretext of a misunderstanding.

(1) Chalmers' Treaties, I. pp. 85, 87. (2) Ward's Treatise, 57, 58.

The British reply to the claim of Prussia is found in two passages in the memorial. It is asserted, that when two powers are at war they have a right to capture each other's ships, merchandise, and effects, found at sea; everything belonging to an enemy being lawful prize, while the goods of a neutral are exempt from capture. It is consequently determined by the Law of Nations, that the goods of an enemy may be seized, although on board the ship of a friend; and that the goods of a friend ought to be given up to him, although found on board the ship of an enemy. It is stated, in a subsequent passage expressly noticing the Prussian proposition, that the converse of the doctrine advanced in that proposition is too notoriously received and everywhere acknowledged for it to be the subject of dispute; as is proved by all the authors who have written on the Law of Nations (to whose works references are given), and by constant usage, both ancient and modern; and that there is no proof more strong of the general rule than is afforded by the exceptions made by particular treaties. (1)

Such is a sketch of the first attempt to introduce an innovation in the Law of Europe, with regard to neutral commerce. It may be confidently affirmed, that the Prussian attempt benefited the cause which it proposed to injure, from the combined effect of the inability to produce arguments of weight on one side, and of the sound reasoning which the opposite party produced in favour of the ancient system. No further discussion on the points at issue took place between the two governments until 1780, when Prussia joined the league of the Armed Neutrality, and endeavoured to obtain by force what she had so signally failed to establish by reason.

(1) *Causes Célèbres*, II. 47, 48, and 60, 61.

Far superior to the reasoners in the Prussian memorial, is the next champion of the rights of neutrals, Martin Hübner, who published his work in 1759. (1) Much of his work is valuable, and all of it is interesting: he possessed great acuteness, and a power of making all his resources available, and a happiness in treating his subject that made a dry question engaging. He was the first professed writer, in point of time, excepting the government memorial above noticed, and is the first writer, in point of merit, that has ever advocated the cause that he espouses. The failure of such an author is a strong presumption against his cause. The weakness of his cause is indeed demonstrable from his own assertions, for he frequently lays down sound principles, expressed with a remarkable clearness and nicety, and it is curious that he could escape perceiving that his conclusions entangled him in self-contradictions. No champion of the principles here contended for would desire a more lucid statement of his positions than the following: "Il seroit absurde d'accorder à quelqu'un le droit de faire une chose, sans lui accorder en même tems celui de se servir des moyens nécessaires pour en venir à bout; et que par conséquent, comme c'est une action juste de faire la guerre, tout ce qui a une connexion exactement nécessaire avec le but légitime de cette guerre, doit être permis et accordé aux parties belligérantes: bien entendu cependant, que les droits d'un tiers n'en souffrent pas plus qu'il ne peut être censé raisonnablement vouloir bien souffrir pour le bien commun de l'humanité." (2) Take also the following section, when, speaking of the right of neutrals to the respect of belligerents, he says, "Cette règle générale n'empêche pas que les nations belligérantes ne puissent

Opinion of
Hübner.

(1) De la Saisie des Bâtimens navires des peuples amis. La Haye, 1759.
neutres, ou du droit qu'ont les nations belligérantes d'arrêter les

(2) *Id.* vol. I. ch. I. § 4.

mettre tout en œuvre pour empêcher que les sujets des états neutres ne fortifient leurs ennemies, pourvu qu'ils n'empiètent point sur les droits parfaits qu'ont ces états, de pourvoir à leur prospérité et à leur conservation." I know of no author by whom the general principles regulating the mutual rights and duties of neutrals and belligerents, are laid down more satisfactorily than in these quotations. It is curious that, starting from such principles, Hübner should have arrived at such conclusions. He says, that it is absurd to contend that belligerents have not a right to do everything that has a necessary connexion with the lawful end of war,—and yet claims for neutrals a power to reinstate the exhausted resources and carry on the paralysed commerce of a beaten enemy. He lays it down that belligerents may do everything to prevent neutral subjects from assisting their enemies,—and yet argues that neutrals may step in and reinforce a weakened navy by enabling a State to draw all its seamen from the merchant service. Hübner's own words may assist us to discover the process by which he becomes involved in such contradictions. In speaking of commerce with a belligerent's colonies, which has been elsewhere considered, (1) he says, that such intercourse "paroit être un objet du droit rigoureux de la guerre." But he proceeds (as was cited on a previous page*), "*cependant je ne vois pas pourquoi les sociétés souveraines qui sont neutres, devraient se refuser un bénéfice considérable qui se présente ; pourvu qu'elles s'abstiennent de fournir à ces colonies aucune denrée prohibée en tems de guerre.*" (2) It is in this case, as in the question of "free ships free goods," that he lays down a position of which the un-

(1) *Ante*, ch. v.(2) *De la Saisie*, &c. I. ch. iv.
§ 6.

[* See p. 265.]

deniable truth would not admit of contradiction, and yet concludes by saying, that he cannot see why neutrals should refuse themselves so considerable a benefit, which he yet admits is an infringement of the rights of belligerents. Such an avowal it must be owned deprives a writer of any weight as an authority, and places him on the level of advocates anxious not for justice, but a verdict. Still, arguments may be sound, although proceeding from a suspected source; let us examine the arguments of M. Hübner.

Hübner differs from almost every writer on his side of the question, and from every single treaty prior to the Declaration annexed to the Treaty of Paris of 1856, whatever, in which it has been agreed that "free ships shall make free goods," in contending at once that the goods of neutrals found on board an enemy shall be free from capture, (1) and that the goods of an enemy on board the ship of a neutral shall likewise be screened from capture. He could see that there existed no right, apart from express convention, to capture the former class of property; but he was unable to perceive that there also existed no right, apart from express convention, to interfere with a third party's rights with regard to the latter class of property; for this latter right, as a general principle, he admits in its fullest extent, stating expressly, that "*le premier droit de la guerre consiste en ce qu'elles (les parties belligérantes) peuvent légitimement nuire à leur ennemis par mer comme par terre.*" (2) His arguments, that "free ships make free goods," are comprised in the two propositions—that neutral ships are part of the neutral territory, from whence, therefore, no enemy's property can be taken,—and that commerce is free to neutrals

(1) *De la Saisie*, &c. II. I. ch. IV. § 5.

(2) *Id.* I. II. ch. III. § 4.

as in times of peace; because the effects of war ought not to injure those who are not parties in the contest. The former proposition has already been fully discussed; (1) and it is the more singular that Hübner should have relied on this fiction, because he himself treats of search as a right incontestable. (2) Now this right cannot be exercised on neutral territory: the fiction is therefore destroyed by his own admission; for if the imaginary sanctity is admitted not to be conclusive against one class of rights, how can it extend to the frustration of another class of rights, at least equally important to the party who claims their exercise? In the same manner with regard to his second position, that neutrals, not being parties in the contest, ought to be free from the effects of war, and to be allowed to trade as in times of peace. Hübner contradicts this unlimited freedom in his own treatise. He allows confiscation of contraband, and the right of blockade; but does not see that the right to seize enemies' goods is a consequence of exactly the same principle, namely, that acts which were incontrovertible rights in time of peace, when they do harm to nobody, cease to be rights under the altered influences of war, when what was before innocent becomes a direct injury to a third party. Belligerents by paying freight on the cargoes, or part of cargoes, taken from the ships of neutrals, exercise their right with the greatest tenderness of the interests of others. An exact contrast to this treatment is afforded by the demand of neutrals to pursue a course of systematic mischief against a belligerent,—a demand at variance with Hübner's own definition of the duties of neutrality, which he well describes as “une inaction entière par rapport à la guerre et à ses opérations.” (3)

(1) *Ante*, p. 273.

III. § 1.

(2) *De la Saisie*, &c. I. II. ch.(3) *Id.* ch. II. § 6.

Hübner, having the example of the Prussian memorial before him, does not fall into the fallacy, which had been exposed in the British reply, of asserting that all authors and all treaties were in favour of his opinions. Knowing that all authority was against him, he boldly denies that the least value is to be attached to preceding authority. The decisions of the *Consolato* are, he says, "good for nothing" as regards practice, and are only useful to satisfy curiosity, and to teach from the mouths of sovereigns themselves, the profound ignorance in which they existed. (1) The opinions of Grotius, who, as we have seen, coincides with the *Consolato*, are, according to Hübner, unworthy of Grotius, "ni trop claires ni bien déterminées, ni tout-à-fait exactes, ou dignes de Grotius." (2) Quoting the opinions of the jurists is, according to Hübner, like quoting Euclid and Newton to prove that two and two make four. Now, there is this difference,—that to quote an authority on a fact which no one doubts, is an absurdity,—but, on a debated question to state that great minds that have dedicated their powers to its consideration, agree in their conclusions, and in some cases without the knowledge of each other's opinions, affords a very strong presumption that these conclusions are correct. Hübner also, knowing that the uniform practice of governments was invariably against him, says, with regard to usages, "si l'on trouve ces derniers contraires à l'équité naturelle, ils ne peuvent jamais devenir obligatoires: s'ils sont indifférens à son égard, ils n'obligent que très imparfaitement: si au contraire, ils lui sont conformes, ces usages deviennent sans contredit obligatoires; non pas en tant que ce sont des usages, mais en vertu du code universel des nations qui les érige en devoirs." (3) With regard to these statements, it may be remarked, that the practice of governments gives

(1) De la Saisie, &c., Discours
prel. XIII. XIV.

(2) *Id.* xv.

(3) *Id.* avant propos, § 7.

greater weight to usage, in indifferent matters, than is allowed by Hübner; but with regard to the question before us they convey a wrong impression, or rather are beside the purpose. Usage does not afford a proof, but it does afford a strong probability, that a course constantly pursued by all governments, is consistent with international equity. Thus, with the question of "free ships free goods," the uniform practice of governments offers a strong *probability* that the reverse of this maxim is a right of belligerents, since all governments have uniformly exercised this right from the time of the *Consolato*, the earliest record existing on the subject, to the present day; not excepting the parties to the Armed Neutrality, who, as we shall see, tried to enforce one principle when they were neutral, but acted upon another when they became belligerent. Hübner, indeed, found insurmountable obstacles in every direction: authority was against him, and so was usage; and he therefore denied the value of either, and was obliged to rest his claims on arguments which show how little his ingenuity could discover for his own support. Treaties, he acknowledged could not be brought to his aid: above the ignorance of the Prussian memorialists, who asserted that all the treaties ever concluded between maritime powers were in favour of their claims, he was aware that treaties are not uniform; and states expressly of the conventional code of nations, "de l'aveu de tout le monde, ses maximes n'obligent et ne peuvent obliger que les parties contractantes." (1)

The greater attention has been paid to the treatise of Hübner, because he was, up to the last few years, by far the most important advocate of his peculiar doctrines that has ever appeared. Subsequent writers have done little more than copy his arguments and re-assert his

(1) De la Saisie, &c., II. II. ch. I. § 2.

opinions. Apart from the opinion he entertains on the question of "free ships free goods," his remarks are often valuable, and his principles sound, from which latter reason, when he entertains false positions, he is, as we have seen, entangled by his self-contradictions. At the time he wrote, it appears probable that the trade of neutrals sustained greater interruptions than at a more recent period, especially in the delay of judgments, which,—however occasioned by the mass of the attempted frauds of neutrals,—was an injury, in those cases when a defect in the proof of innocence justified a belligerent in the capture but did not expose the neutral to condemnation. Still it was to this defect in the *administration* of the law that Hübner should have applied his efforts, and not to the denial of the right itself. In the one case he might have succeeded in obtaining a remedy, in the latter attempt he has certainly failed.

In the same year with the treatise of Hübner appeared Lord Liverpool's "*Discourse on the Conduct of Great Britain in respect to Neutral Powers during the present War.*" (1) A better answer to Hübner could not be desired. Although partly written with especial reference to the Dutch treaties, it contains an admirable exposition of the general rights and duties of neutrality in maritime questions. The question of "free ships free goods" is treated under the different heads of natural equity, authority and conventional law. The reasoning is very clear, and, as it appears to me, irresistible, and it is conveyed in a fine nervous style that is a fit vehicle for its manly logic. As the treatise of Hübner has been followed by his adherents, so has the treatise of Lord Liverpool been the armoury for the resort of those who have desired weapons for his side of the contest. It is

(1) The edition here quoted is the 2nd, dated 1759; the treatise was reprinted in 1785, and also in 1800.

very short, but it contains the best arrangement for arguments on the question that has yet been exhibited, and the well-known criticism in the *De Cive* may be applied to Lord Liverpool's treatise, that, although small in compass, it is "the very marrow of wisdom" on the subject on which he delivers judgment.

Opinion of
Vattel.

Contemporary with Hübner and Lord Liverpool was Vattel, whose work on the Law of Nations was published in 1758. He is an author whose impartiality, united to the power with which he treats his subject, have made him of more frequent reference than any modern writer on the Law of Nations; and his Swiss descent and education place him beyond the influence of bias in maritime discussions. It is in the following distinct and decisive manner that he records his judgment.

"If we find an enemy's effects on board a neutral ship, we seize them by the rights of war: but we are naturally bound to pay the freight to the master of the vessel, who is not to suffer by such seizure."

"The effects of neutrals, found in an enemy's ship, are to be restored to the owners, against whom there is no right of confiscation; but without any allowance for detainer, decay, &c. The loss sustained by the neutrals on this occasion is an accident to which they exposed themselves by embarking their property in an enemy's ship; and the captor, in exercising the rights of war, is not responsible for the accidents which may thence result, any more than if his cannon kills a neutral passenger who happens unfortunately to be on board an enemy's vessel." (1)

(1) Vattel, *Droit des Gens*, liv. III. ch. vii. § 115, 116.

We now come to that period when, by the Armed Neutrality of 1780, an attempt was made to introduce, by force, the recognition of the principle that "free ships should make free goods." Exactly at this period appeared the works of two writers of great authority.

The first of these is Moser, whose tenth volume, containing his observations on neutrality, was printed in 1780, the very year of the Northern Confederacy. His testimony is of especial importance on the point, whether usage or convention had established a rule in Europe different from the law as we have seen it laid down by the elder jurists. Moser wrote principally on the Positive Law of Europe, as established by usage or compact, on which his research was of the most profound character; his publications on these inquiries continuing, at intervals, during the long literary career of fifty years. He had nothing to bias his partiality on the side of the old system, being, on the contrary, Counsellor of State in Denmark, one of the parties to the Armed Neutrality. He, however, distinctly lays it down, when treating of neutral commerce, that when the property of a belligerent is found by his enemy in the ships or land-carriages of a neutral, such property is made prize by the captor, the ships or carriages being allowed to pass unmolested, and freight or carriage being paid by the captor. On the other hand, he says, that the treatment of the property of neutrals found in the ships of belligerents has not been of equal certainty, as we shall have occasion to see in considering the laws of France and Spain, so that he concludes that it is, at least, imprudent for a neutral to intrust his property to the ship of a belligerent. Examples of his positions are given by Moser, who is here quoted as the most satisfactory authority that can be desired, not

Opinion of
Moser.

so much upon the abstract right of the question as upon the point whether usage had interfered to derogate from this right. (1)

Opinion of
Lampredi.

On the question of Right we have the contemporary authority of Lampredi, Professor of Jurisprudence at Pisa, whose testimony must be, at least, regarded as impartial, as, in common with all members of small maritime States, the interest of his countrymen was for an enlargement of the privileges of neutrals; and he himself frankly states that he wishes that the great nations of Europe would agree to establish among themselves the principle that "free ships make free goods." But although holding the desire to have a certain course of action established universally by convention, he allows that such a privilege cannot be claimed unless from express convention. Lampredi states, that there is an apparent collision between the right of a belligerent to prevent such intercourse as may assist his enemy, and the right of a neutral to be perfectly free from the effects of a war in which he is not concerned. But, on weighing the relative importance of the two cases, he says, that the neutral has really but a very slight injury to dread, as the belligerent pays him freight on the captured property; while, on the other hand, the consequence to belligerents would be incalculable if a neutral were allowed to strengthen the other belligerent, and enable him to prolong hostilities; every such increase of force would make the neutral the cause of the increased bloodshed and devastation which such prolongation of the contest occasioned. He observes, that there is hardly any right which does not in some manner infringe some other right, and that a suspension, which is reparable, can never be allowed to weigh against a loss which is

(1) Moser, Versuch, B. xx. cap. 2, § 33, 34.

irreparable. He says that the capture of enemies' property in neutral ships stands on completely a different footing from the denial of all commerce with an enemy; the latter obstruction would do the greatest injury to neutrals, the former falls almost entirely on belligerents. He examines Hübner's arguments, especially that founded on the fiction of a ship being part of her State's territory, which he shows to be quite untenable. Treaties, he says, are so much at variance with each other, that no conclusion can be deduced from their contradictory provisions. The declamation on the asserted tyranny of taking an enemy's property from a neutral ship is therefore, he concludes, unreasonable, the principle of doing so being founded on reason, and conformable to justice. In the ensuing section, Lampredi considers the case of the property of neutrals found on board the ship of an enemy, which he says must be restored to the owners, as belligerents have no claims upon the movable property of a neutral even when found in the territory of an enemy, much less on board a ship, to which no territorial character is attached. (1)

An opinion contrary to the above has been given by two modern writers, Klüber and De Martens. In the short passage which he dedicates to this subject, Klüber is, as is usual with him, very learned in his references, but very inconclusive in his reasoning. He says that a ship ought to be regarded as a floating colony of the State to which she belongs; that, in consequence, no belligerent has a right to visit neutral ships at sea, nor to capture enemy's property laden on board them. Thus, Klüber places the denial of the right of search and the principle that "free ships make free goods," on the same footing, namely, the *territoriality* of ships at

Opinion of
Klüber.

(1) Lampredi, du Commerce traduit into French by Pouchet, § x. xi. p. 103—151.

sea, which we have already discussed. Klüber also says that neutral goods found on board an enemy's ship are not liable to confiscation, because such confiscation does not ensue when neutral property is found on an enemy's territory. (1)

Opinion of
De Martens.

Similar is the opinion of De Martens, who, like Klüber, only dedicates about a page to the subject, and gives no reasons for his opinion, except that a ship is part of the territory of her State. Both writers say, that the practice of Europe has been by no means uniform, and both, giving no arguments to examine, leave their unsupported assertions without any positions to controvert. (2)

(1) Klüber, Par. II. tit. I. ch. II. § 299.

(2) De Martens, Précis, liv. VIII. ch. VII. § 316. At the time of the second Armed Neutrality, in 1800, a variety of pamphlets appeared on each side of the question, which I have a difficulty in mentioning, because I have only seen those on one side, excepting a little treatise by Büsch. But it has been by no fault of mine that I have not seen the treatise of Schlegel, which was much discussed at the time, and which appears to have been the best work on the subject, on the side of Hübner, since the work of the latter writer. Schlegel was a judge in Denmark, and his work was professedly a discussion on the right of search, in examination of Sir Wm. Scott's judgment on the Danish convoy; but it besides considered all the most important questions of prize law. This treatise was written in Danish, and was translated into English, and I believe into German, but I

have not been able to obtain a copy, after an extensive search among the booksellers; nor is there a copy of the work in the British Museum, nor in the libraries of the Inner Temple, nor of Doctors' Commons. On the treatises by Mr. Ward and Dr. Croke, in answer to Schlegel, I cannot give an opinion, *quoad* answers, from not having seen the work which they attack, but independent of their controversial merit they are excellent treatises, especially that of Mr. Ward. Both these treatises are now scarce, and I did not obtain that of Mr. Ward till I had prepared the greater part of this chapter: I was surprised to find how much I resembled him in the management of the discussion, which some reflection enabled me to discover, arose from both having followed the example of a third party, namely, Lord Liverpool. I felt encouraged and supported by finding that my own opinions coincide with those of Mr. Ward.

[This subject has been largely discussed by recent continental writers on the Law of Nations. Among these, Hautefeuille and Ortolan are notable, as having made laborious inquiries into the history of the matter, and almost passionately denounced the view of the law persistently adhered to, in default of special treaty, by England. The arguments of these writers usually rest upon *à priori* conceptions of what the law, in their opinion, ought to be, and they find, in treaties specially made for the purpose of varying the general rule, only a statement of it. Heffter admits there are in existence two theories as to the actual state of the law, but also says that the one contended for by England is the older of the two, and that the more modern theory was only introduced by neutral States as a measure of defence, and that it was "never believed to be grounded upon any sufficient legal principle." Sir J. Phillimore has fully investigated the subject in all its aspects, and is an earnest advocate of the English view."]*

This section may be concluded by a quotation from an American writer of great and deserved eminence, Chancellor Kent. Speaking of the "Baltic conventional law of neutrality," he says, "it was soon abandoned, as not being sanctioned by the existing Law of Nations, in every case in which the doctrines of that code did not rest upon positive contract. During the whole course of the wars growing out of the French Revolution, the government of the United States admitted the English rule to be valid, as the true and settled doctrine of international law; and that enemy's property was liable to seizure on board neutral ships, and to be confiscated as prize of war." * * * * *

Opinion of
Kent.

[* See *Hautefeuille's* "Des Droits et des Devoirs des Nations Neutres," tit. X.; *Ortolan's* "Diplomatie de la Mer," liv. III. c. v.; *Heffter*, § 162, and *Phillimore*, Part IX. c. x.]

"The two distinct propositions, that enemy's goods found on board a neutral ship may lawfully be seized as prize of war, and that the goods of a neutral found on board an enemy's vessel were to be restored, have been explicitly incorporated into the jurisprudence of the United States, and declared by the Supreme Court to be founded on the Law of Nations." And finally, "I should apprehend the belligerent right to be no longer an open question; and that the authority and usage on which that right rests in Europe, and the long, explicit and authoritative admission of it by this country, have concluded us from making it a subject of controversy; and that we are bound, in truth and justice, to submit to its regular exercise, in every case, and with every belligerent power who does not freely renounce it." (1)

SECTION III.

Of the Customary and Conventional Law of Nations on this question, till the time of the Armed Neutrality of 1780.

We now come to the last division of this question, and have to inquire, whether the Customary or Conventional Law of Europe, has been such as to alter the law as derived from the two preceding sources.

Treaties before
the 17th
century.

The first occasion in which, as far as I am aware, this topic is mentioned, is in a treaty between England and Spain, in 1351, which engages that Spanish goods, captured on board an enemy's ship, shall be restored to their owners. (2)

A similar stipulation was made, in the treaty of 1353,

(1) Kent's Commentaries on ch. VIII.
American Law, Abdy's edition, (2) Rymer, *Fœdera*, III. i. 71.

between England and the deputies of the maritime towns of Portugal. (1)

In 1370, it was declared between England and Flanders, that the subjects of Flanders should abstain from carrying the goods of the enemies of England: the Flemish government was to take security that there were no such goods on board, and to grant passports, on the exhibition of which Flemish ships were to pass in security; the Flemings were not to supply the enemies of England with any arms or provisions, and transgression was to be punished on the persons and goods of the offenders. (2)

In 1373, Edward III. ordered restitution of a Portuguese ship to her owners, after all enemies' property had been taken out. (3)

In 1406, in a treaty between Henry IV. of England and the Duke of Burgundy, it was declared, that "les marchans, maistres des niefs et maronniers dudit Pais de Flandres, ou demourans en Flandres, ne amesront pour fraude ne couleur quelconque, aucune biens ou marchandises des ennemis des Englis par mer; et en cas qu'ils en soient demandez par aucuns escumers ou autres gens de la partie d'Engleterre, eulx en feront pleine et juste confession." (4)

In 1417, a similar engagement was made on a truce between Henry V. and the Duke of Burgundy; but in this treaty, the unusual stipulation was made that, there being then war between England and Genoa, if any Flemish goods were found on board Genoese vessels taken by the English, they should be forfeited as lawful

(1) Rymer, *Fœdera*, III. i. 88.

(3) *Id.* III. ii. 4.

(2) *Id.* 172.

(4) *Id.* IV. i. 111.

prize. (1) This is the only instance that I have met with in which the claim that neutral goods found in an enemy's ship are liable to capture as lawful prize, has ever been asserted, or ever been specified in treaty by this country, unless *in return* for the stipulation that enemy's goods are free in a neutral ship.

In 1436 and 1437, an ordinance of Henry VI. directed that vessels having passports from the King of Portugal, or his officers, declaring that these ships had no enemy's property on board, should not be hindered or molested. (2)

A treaty between England and Burgundy, in 1446, (3) renews the stipulation of the treaty of 1406, above quoted. The same States renewed the stipulation in 1467, (4) in 1478, (5) and in 1495; (6) and the same clause was inserted in the treaty between England and the Duke of Britany in 1468, (7) renewed in 1486. (8)

In 1460, a stipulation of the same import, but in different words, was made in the treaty between Henry VI. and Genoa; it being declared that if the ships of either party had on board goods belonging to the enemies of the other, such goods were to be delivered up immediately on requisition, an oath being taken to ascertain the ownership, and freight being paid by the captors; and, in case of such delivery being refused, the ships and goods of the recusants might be taken by force, and the crew made prisoners. (9)

They all coincide with the *Consolato del Mare*.

The above cited treaties are the only instances in which, as far as I have been able to discover, the ques-

(1) Rymer, *Fœdera*, IV. II. 13 and 80.

(2) *Id.* V. I. 35, 37.

(3) *Id.* 165.

(4) *Id.* V. II. 151.

(5) *Id.* V. III. 88.

(6) *Id.* V. IV. 85.

(7) *Id.* V. II. 161.

(8) *Id.* V. III. 178.

(9) *Id.* V. II. 92.

tion before us was mentioned until the seventeenth century. There are various other treaties of commerce, between different powers, of the same period, but in none of these is the subject mentioned. The investigation of writers who have desired to establish the principle that "free ships make free goods," has not been able to produce one treaty during this period that will support their opinions. It will have been remarked that the above treaties are all uniform in the purport against the doctrine of "free ships making free goods," and are all in support of the *Consolato del Mare*.

The first treaty which deviated from the usual practice was that between France and the Porte, in 1604, which stipulated, that French property, found on board the ships of the enemies of the Porte, should be restored to the owner; and *also*, that goods belonging to the enemies of the Porte, laden on French vessels, should not be liable to seizure. (1)

First deviation from this rule.

This example was not, however, followed, even in conventions with the Barbary powers. In the treaty between the States General and Tunis, in 1622, and in the treaty, of the same year, between the States General and Algiers, it was agreed, that the goods of the enemies of the two Barbary powers might be taken from the ships of the United Provinces, freight being paid by the captor. (2) France made the same stipulation in treaty with Algiers in 1628, (3) and the principle of capturing the goods of enemies in the ships of friends is again acknowledged in the treaty between England and France in 1632. (4)

Subsequent treaties.

The first instance in which the principle of the flag covering the cargo was asserted between Christian

(1) Dumont, V. II. 40.

(2) *Id.* 412, 413.

(3) *Id.* V. II. 559.

(4) *Id.* VI. I. 33.

powers was, I believe, in 1650, in the treaty between Spain and the United Provinces; in which it is agreed, arts. XIII. and XIV., that the goods of either party found on board the ships of the enemies of the other shall be confiscated, and that the goods of the enemies of either party shall be free from capture when on board the ships of the other party, being neutral. (1)

A few years before this, a treaty had been made between France and Holland, in 1646, which certainly would, from the words employed, appear to include the principle that "free ships make free goods," but which was not understood in this sense by the French. By the French ordinance of 1584, the property of enemies confiscated the property of neutrals, when found together; thus, a neutral ship was confiscated if she had enemies' property on board, and neutral goods were also confiscated if found on board an enemy's vessel. Remonstrances having been made against this hard treatment, it was granted by the French king, in the treaty now quoted, that, for four years, the ordinance should be suspended with regard to the United Provinces, whose ships "*seront libres, et rendront aussi toute leur charge libre, bien qu'il y eust dedans de la merchandise, même des grains et légumes, appartenans aux ennemis; sauf et excepté toutefois les marchandises de contrebande.*" This would seem to us at the present day to convey the privilege that "free ships should make free goods;" and it appears that the Dutch so understood the article; but when, in 1653, De Witt endeavoured to establish this principle in treaty with France, the Dutch negotiator, Boreel, found, to his surprise, that the French never intended this construction of the treaty, which they understood merely to convey an abrogation of the ordinance of 1584 on the

(1) Dumont, VI. i. 571.

infection of hostile property, and that they only allowed its import to be that hostile goods, even provisions, found on board a neutral ship should not, for four years, entail the confiscation of the ship and the remainder of the cargo. (1) I suppose that the same construction must have been intended by the French in their treaty with the Hanse Towns, in 1655, of which the tenor is similar, that, for fifteen years, the neutrality of the Hanse ships should make their cargoes free, and that the goods of Hanse subjects, being neutral, should be restored to them if found on board the ships of the enemies of France. (2) The construction seems forced, now that we are accustomed to attach so different a meaning to similar expressions; but the treaty bears a near resemblance to that of 1646, and it is improbable that Louis XIV. would grant to the Hanse Towns, for whom he could not feel much concern, terms which he was refusing to the Dutch, who only obtained this privilege after long negotiations.

In 1654 was made the first treaty in which this country agreed that the flag should cover the cargo. In the treaty between England and Portugal, of this year, it was agreed that the goods of either party should be lawful prize if found on board the enemies of the other, and that the goods of the enemies of either should be free from capture when on board the ships of the other, being neutral. (3)

In the treaty, however, made the same year, 1654, between England and the United Provinces, no alteration is made in the old rule, (4) although each of the contracting parties had the new stipulation in force with other allies. Nor is there any alteration made in

(1) See Ward, 128—132.

(3) *Id.* VI. II. 84.

(2) Dumont, VI. II. 103, 104.

(4) *Id.* VIII. 74.

our treaty with Sweden of the same year ; (1) nor in our treaty with Denmark, likewise of 1654 ; (2) nor in the treaty between the United Provinces and Brandenburg, in 1655.

Indeed, in pursuing this investigation chronologically, nothing can be more obvious than that nothing like a general principle was established by the treaties of the seventeenth century ; treaties of directly opposite tendency being made by the same powers at the same period. Thus we have seen above that England had agreed to the clause that " free ships should make free goods, and enemy's ships make enemy's goods," in our treaty with Portugal in 1654 ; but in our treaty with Sweden, in 1655 (supplementary to the above cited treaty with Sweden in 1654), express provisions are made to prevent the goods of enemies from being fraudulently concealed on board the ships of friends. (3) Again, Sweden made no alteration in the old rule in her treaty with the United Provinces in 1656, (4) although the United Provinces had the new stipulation in their Spanish treaty of 1650. It is to the Dutch that must be ascribed, not only the introduction of the principle, " that free ships shall make free goods," in the first treaty in which this was recognized between two Christian powers, but their steadfastness of purpose in negotiating for this privilege was the occasion of its ever having been at all generally stipulated in treaties between European powers. The carrying trade, one great source of their commercial wealth and maritime importance, evidently had its security incalculably augmented and its value proportionably heightened, by an arrangement which allowed the Dutch, when neutral, to carry on the commerce of all States at war, at a time when war was the rule, and peace the exception,

(1) Dumont, VI. II. 80.

(2) *Id.* 92.

(3) *Id.* 108.

(4) *Id.* 126.

among the States of Europe. De Witt made the attainment of this privilege the constant aim of his negotiations in France and England. But he never thought of claiming this principle as a right; his whole aim was to obtain it as a privilege; and his negotiators endeavoured to procure this stipulation by offering in return, invariably, that the goods of neutrals found on board the ships of enemies should be lawful prize to the captors. Notwithstanding the assiduity of the Dutch ambassadors, many years elapsed before this privilege was granted to them; the refusals of their proposition were constant, both in France and England; and it was not till between fifteen and twenty years after their first advances that the Dutch obtained this privilege from France, in 1661; and they afterwards made use of our desire to detach them from French interests to obtain from us the same stipulations, in their treaty with England in 1667.

To continue the chronological account of the treaties on this subject between European powers. By art. XIX. of the treaty of the Pyrenees, in 1659, it was agreed between France and Spain, that the new clause of free ships making free goods, and the reverse, should be the future rule between the two nations. (1) To this treaty the United Provinces became parties in 1661, (2) in which year the United Provinces also introduced the new stipulation in their treaty with Portugal. (3) In our treaty with Sweden, also of 1661, it is expressly stipulated, art. XII., that enemies' goods, in the ships of either confederate, shall be prize to the captor; and that the goods of either confederate, found in the ships of enemies, shall be restored to their owners. (4) Also in the treaty between Sweden and France, in 1661, (5)

(1) Dumont, VI. II. 267.

(4) *Id.* 387.

(2) *Id.* 346.

(5) *Id.* 381.

(3) *Id.* 369.

no alteration is made in the old rule; nor in those made between the same parties in 1662, (1) and in 1663. (2) Our treaty with Denmark, in 1661, makes no alteration in the old rule; (3) but in a treaty between Denmark and France, in 1662, the clauses of "free ships free goods," and the reverse, are introduced. (4) In the treaty between the United Provinces and France, of the same year, the new clause is introduced, making art. xxv.; (5) but in the treaty between the United Provinces and England, also of 1662, no alteration is made in the old rule. (6)

In 1667, the new clause, that "free ships shall make free goods," and the counter-stipulation, was inserted in the treaty between England and Spain, (7) and in the treaty between the United Provinces and Sweden, (8) and also, for the first time between these two powers, between England and the United Provinces, at Breda. (9) But in our treaty, dated the same day, 31st July, 1667, with Denmark, no alteration is made in the old rule. (10) In 1668, the above treaty of Breda was renewed between England and the United Provinces; (11) and in the same year the treaty of the Pyrenees, which contained the new principle, was renewed between France and Spain, at Aix-la-Chapelle. (12)

In the treaty between Great Britain and Denmark, of 1670, express provision is made by art. xx., to prevent the goods of enemies from being screened from capture, by the ships of either confederate, being neutral. (13)

(1) Dumont, VI. II. 446.

(2) *Id.* 448.

(3) *Id.* 346.

(4) *Id.* 439.

(5) *Id.* 415.

(6) *Id.* 423.

(7) *Id.* VII. I. 27

(8) *Id.* 38.

(9) *Id.* 49.

(10) *Id.* 53.

(11) *Id.* 74.

(12) *Id.* 90.

(13) *Id.* 128.

No alteration in the old rule is made in the treaty of commerce between England and Savoy in 1668.(1)

The clause that "free ships make free goods," and the reverse, is found in the treaty of 1674, between Great Britain and the United Provinces, art. VIII.(2) Also in art. VIII. of the treaty between Sweden and the United Provinces, in 1675.(3) Also in art. VIII. of the treaty between France and England, in 1677.(4) Also in art. XXII. of the treaty of Nimeguen, between France and Holland, in 1678.(5) Also in art. XXII. of the treaty between Sweden and the United Provinces, in 1679.(6) In 1689, different treaties in which the new clause was embodied were renewed by treaty between England and the United Provinces.(7) The new clause is also found in art. XVII. of the treaty of Ryswick, between France and the United Provinces, in 1697.(8) But in the commercial treaty between Denmark and the United Provinces, in 1701, no alteration is made in the old rule.(9)

The treaties of Utrecht, in 1713, contained the principle that "free ships make free goods," and the reverse, these stipulations being found in arts. XVII. and XXVII. of the commercial treaty between France and England,(10) and in arts. XVII. and XXVI. of the commercial treaty between France and the United Provinces.(11) The treaty between Spain and Great Britain, in 1713,(12) renews the treaty of 1667, in which this clause was inserted; and the treaty between Spain and the United Provinces, in 1714, confirms the treaty of 1650, which

(1) Dumont, VII. I. 119.

(2) *Id.* 283.

(3) *Id.* 317.

(4) *Id.* 329.

(5) *Id.* 359.

(6) *Id.* 440.

(7) *Id.* VII. II. 236.

(8) *Id.* 389.

(9) *Id.* VIII. I. 32.

(10) *Id.* 348, 349.

(11) *Id.* 379, 380.

(12) *Id.* 409.

contains this provision ; (1) which also is found in arts. v. and ix. of the treaty between Russia and the United Provinces in 1715. (2)

But in the treaty between France and the Hanse Towns, in 1716, it is declared, art. xxii., that the rule of 1536, 1584, and 1631, by which "*la robe ennemie*," confiscates both the ship and the goods which it contains, is annulled, and the Hanseatic ships, carrying the goods of the enemies of France, shall be free, such goods being taken out and confiscated—establishing so far the old rule, but adding, art. xxiv., that Hanseatic goods, found on board the ships of the enemies of France, shall be confiscated, although not contraband. (3)

The clause that "free ships make free goods," and the reverse, is again found in the arts. viii. and x. of the treaty of Vienna, between Spain and the Empire, in 1725. (4)

No alteration in the old rule is made by the treaty of commerce between England and Russia, in 1734. (5)

In the treaty between France and Hamburgh, in 1769, the French rule was relaxed as far as it ordained, "*que la robe ennemie confisque la marchandise et le vaisseau ami*," (art. xxiii.), but the goods of the neutral Hamburghers, found on board the ships of the enemies of France, were to be confiscated, and also the goods of such enemies, found on board the neutral ships of the Hamburghers, were to be confiscated, art. xiv. and xvii. (6)

In the year 1779 France made a treaty with the Duke of Mecklenburgh Schwerin, of exactly the same

(1) Dumont, VIII. l. 481.

(2) *Id.* 470, 471.

(3) *Id.* 479.

(4) *Id.* VIII. ii. 115.

(5) *Id.* Supp. II. ii. 495.

(6) *Id.* I. 640, 643.

tenor as the above treaty with Hamburg, the articles on this subject XI. and XXI., being copied verbatim, excepting the change of names, from the articles XIII. and XXIII. of the treaty of 1769. (1)

In a treaty between Prussia and Sweden, in 1762, the clause was inserted that "free ships should make free goods," and that an enemy's ship should make her cargo liable to seizure. (2)

In the treaty of 1778 between France and the United States the principle of "free ships free goods," and "enemy's ships enemy's goods" was agreed upon by articles XIV. and XXIII. (3)

With these treaties we come to the time of the Armed Neutrality of 1780; but, before noticing this confederacy we must observe what had been the ordinances of the French court on this subject. By the old French ordinances of 1543 and 1584, it seems, says Valin, that it was only the enemy's goods that were taken from a neutral ship, the ship not being confiscated; such at least, he says, was the interpretation given by Cleirac. By the ordinance of 1650, when prizes were made by French cruizers, "les marchandises qui se trouveront appartenir à nos amis, alliés, et sujets, [seront] rendues et restituées, et les autres appartenant à nos ennemis confisquées, et adjudgées à qui il appartiendra, suivant la rigueur de nos ordonnances." (4) Thus at that period the French conformed to the rule laid down in the *Consolato*. But the ordinance of 1681 was of much greater severity. By this, neutral ships having enemy's goods on board were confiscated with their whole cargo, and enemy's ships having neutral goods on board were

French rule on this subject.

(1) Dumont, Supp. II. 713, 716.

(3) *Id.* II. 594, 597.

(2) De Mar. Rec. I. 39.

(4) Valin, Ord. de la Marine, liv. III. tit. IX. art. 1.

likewise confiscated with their whole cargo. This rigorous legislation, "*que la robe ennemie confisque celle d'un ami*" was, it is allowed by Valin, confined to France and Spain. (1) By art. v. of the ordinance of 1744, the goods of an enemy found on board neutral ships were to be confiscated, and the neutral ship allowed to pass free; but this, says Valin, was only made from a reference to particular treaties, and might be changed in the sequel. (2) By the ordinance of 24th June, 1778, the ordinance of 1681 was renewed as far as not excepted from by more recent regulations. (3) By the ordinance of 26th July, 1778, the severe rule of France was thus far relaxed, that neutral ships carrying contraband of war were not to be confiscated, unless two-thirds of the cargo were contraband. (4) And by the Spanish ordinance of 1780, only enemy's property was to be taken from neutral ships, and the ships themselves to be allowed to go free, and freight was to be paid on the goods taken from them. (5) Thus had the prize law of France and Spain been of the greatest severity, and as far as possible from admitting that "free ships should make free goods," which principle we shall nevertheless see them most eager to establish, as soon as their maritime inferiority in the war with England made them anxious to claim this protection to their commerce. It may be as well to mention here, that the practice of our courts has always been consistent and unvaried. In 1640, on the occasion of some English vessels being confiscated by the French, according to their practice, for carrying the goods of the enemies of France, the French government replied to our demand of restitution that they were justified by our having adopted a similar practice: but Sir Henry Martin, "the best civilian of his age and the most

(1) Valin, *Ord. de la Marine*,
liv. III. tit. IX. art. VII.

(2) *Id.* vol. II. p. 253.

(3) De Martens, *Rec.* III. 122.

(4) *Id.* 19.

(5) *Id.* 98.

versed in maritime jurisdiction," wrote thus,—“that which is alleged by the French to be practised in our courts of Admiralty is absolutely denied, and neither the law nor practice hath ever been here to confiscate the goods of friends for having enemies' goods among them: we are so far from doing any such act of injustice, that, when in time of war we have met with any such prizes, the freight hath always been paid by the taker for those enemies' goods that he took, and those that belonged to friends were duly restored to them.” (1)

SECTION IV.

Of the “Armed Neutrality,” and Conventions since that period.

The commencement of the Armed Neutrality of 1780, may be traced to a circular issued by the Russian court to different European powers, dated 28th February, 1780. This document, after setting forth the great tenderness which the Empress had herself evinced in regard to neutral commerce, and the vexations, on the other hand, which neutral commerce, especially Russian, had been subjected to during the existing war, went on to state that her Imperial Majesty felt called upon to take measures to maintain her own dignity and the welfare of her subjects; and that, to prevent future misunderstanding, she had determined to communicate the principles on which she proposed to act, which she did with the greater confidence, as these principles were based on the primitive rights of nations, were such as every nation had a right to insist on, and were such as the belligerent States could not invalidate without violating the laws of neutrality, and without disavowing the maxims which they themselves had adopted, especially in different treaties and public engagements.

Origin of the
Armed Neu-
trality.

(1) Lord Liverpool's Discourse, &c. regarding Neutral Powers, p. 24.

The principles referred to consisted of the following provisions :

Its principles. I. That neutral ships might freely trade from port to port, and upon the coasts of nations at war.

II. That the property of the subjects of belligerent powers should be free on board neutral ships, excepting goods that were contraband.

III. That with regard to contraband goods, the Empress bound herself by what was contained in the arts. x. and xi. of her treaty with Great Britain, extending these obligations to all belligerent powers.

IV. That to determine what characterises a blockaded port, this term shall be confined to places where there is an evident danger in entering, from the arrangements of the power which is attacking, with vessels stationary and sufficiently close.

V. That these principles shall serve for a rule in the proceedings and judgments on the legality of prizes.

To support these principles, the Empress added that she had fitted out a considerable portion of her fleet, which she, nevertheless, trusted that the interests of her subjects, or the honour of her flag, would not render it necessary to employ. (1)

This Manifesto, with the second article of which we are at present alone concerned, was forwarded to different belligerent and neutral powers. In reply to this communication, France, (2) Spain, (3) and the United

(1) De Martens, Rec. III. 158
—160.

(2) *Id.* 162.
(3) *Id.* 164.

Provinces, (1) immediately expressed their concurrence in its provisions.

But Great Britain never acquiesced in the pretensions of the Russian Memorial, and the reply of our court to the Russian communication stated, that "his Majesty hath acted towards friendly and neutral powers according to their own procedure respecting Great Britain, and *conformably to the clearest principles generally acknowledged as the Laws of Nations, being the only law between powers where no treaties subsist*, and agreeably to the tenor of his different engagements with other powers, whose engagements have altered this primitive law, by mutual stipulations proportioned to the will and convenience of the contracting parties:" that precise orders had been given respecting the flag and commerce of Russia, according to the Laws of Nations and the tenor of our treaty of commerce; that it was to be presumed that no irregularity would happen, but that otherwise redress would be afforded by our courts of Admiralty, judging according to the Laws of Nations, "in so equitable a manner, that her Imperial Majesty shall be perfectly satisfied, and acknowledge a like spirit of justice which she herself possesses." (2)

Note of the British cabinet respecting it.

Negotiations subsequently took place between some of the Northern Powers, explanatory of the assistance that was to be afforded in case the concurrence in an association should draw down an attack upon one of the confederates. (3) In July, 1780, Denmark, and afterwards Sweden, forwarded circulars to the courts of London, Paris, and Madrid, stating their intention to abide by the five articles of the Russian Manifesto,

France and Spain, then *belligerents*, acquiesced in the principles advanced.

(1) De Martens, Rec. III. 168.

(2) *Id.* 160, and Ann. Reg. for 1780, (115).

(3) For the notes between

Russia and Sweden see De Martens, Rec. III. 170—173, and Ann. Reg. (118, 120).

which were copied *verbatim*, with the exception of the alteration of the date of the respective treaties defining contraband. In reply to these circulars France and Spain returned answers highly applauding the proceedings of the Northern courts, and stating their acquiescence in the provisions of the new arrangements. (1)

Remonstrance
addressed by
Great Britain
to Denmark.

But Great Britain appealed to the faith of treaties, of which the conduct of Denmark and Sweden was in direct violation. In the British Note to Denmark, dated 25th July, 1780, it was stated that the Danish commerce had always been treated by us in conformity with the treaties which had subsisted between the two nations for upwards of a century, (the treaty of 1670 being still in full force,) that "their reciprocal rights and duties were evidently traced by these solemn engagements, which would become illusory could they be changed otherwise than by mutual consent. They subsisted at the present moment in their full force, and, equally obligatory on each of the contracting powers, they formed an inviolable law for both." Our government had always followed their stipulations, and expected the same conduct from the court of Denmark. (2)

And to
Sweden.

In the same manner, in the British reply to the Note of Sweden, it was stated that the articles of our treaties with Sweden offered a direct answer to her novel pretensions. The twelfth art. of our treaty of 1661 was cited, wherein it is expressly stated that the goods of enemies shall not be concealed on board the ships of the other confederate; and that the goods of enemies found on board the ships of either confederate shall be made prize, but the goods of the subjects of the confederate

(1) De Mar. III. 175—187.

(2) *Id.* 182.

shall be restored. Treaties, it was added, cannot be altered, unless by the mutual consent of the contracting parties; they are equally obligatory on both, and the King would observe and maintain them as a sacred and inviolable law. (1)

Appeal to the faith of treaties had, however, no effect on the conduct of these courts. Not that the obligation of these treaties was, or could be, denied. So far from it, these treaties were expressly cited by these courts themselves; and some of the articles of these treaties were appealed to as still existing, by both Sweden and Denmark, while other articles of the same treaties were flagrantly violated at the same moment. Thus Denmark, in her treaty with Russia, stated in art. III., that she would abide by her treaty with Great Britain of 1670, for her definition of contraband between herself and England; (2) yet, by this same treaty, provision was made to prevent the goods of enemies from being concealed on board the ships of friends. And in art. II. of the treaty between Sweden and Russia, Sweden refers expressly to art. XI. of her treaty of 1661, for her definition of contraband between herself and England: (3) yet, by the very next article, the twelfth, it was engaged that the goods of enemies should be taken from the ships of friends. Yet it was with such a flagrant violation of right, for the sake of a transient interest, that these powers entered upon treaties, based, according to their high-sounding preamble, on the dignity of the contracting sovereigns, their care for the happiness of their people, and their solicitude for the rights of mankind in general.

Appeal to the faith of treaties unavailing.

On the ^{28 June}_{9 July} 1780, was made the treaty between Russia and Denmark, which was the first of the series

Treaties of the Northern courts.

(1) De Martens, III. 188.

(3) *Id.* 200.

(2) *Id.* 191.

establishing the confederacy of the Armed Neutrality. By art. III. of this treaty, it was stated, that "their Majesties after having already insisted, in their declarations to the belligerent powers, on the general principles of natural right, of which the freedom of commerce and navigation as well as the rights of neutral nations are a direct consequence, have resolved no longer to allow them to be dependent on an arbitrary interpretation, suggested by isolated and momentary interests. With this view, they have agreed,

I. That all vessels may freely navigate from port to port, and upon the coasts of nations at war.

II. That property belonging to the subjects of States at war, shall be free on board neutral vessels, excepting merchandise of contraband.

III. That to determine what characterises a blockaded port, this term shall only be allowed to those where, from the arrangements of the power which is blockading, with vessels stationary and sufficiently near, there is an evident danger in entering.

IV. That neutral vessels cannot be stopped, without just cause and evident reasons; that they shall be judged without delay; that the proceedings shall be always uniform, prompt, and legal; and that, in every instance, besides the reparation afforded in cases in which there has been loss, but not offence, complete satisfaction shall be given for the insult offered to the flag of their Majesties.

The treaty then went on to engage that each party should equip a fleet to support these principles, that mutual succour should be afforded, and that both parties should act in concert; that these stipulations should be

regarded as permanent, and that other powers should be invited to accede to similar conventions. (1)

A treaty precisely similar, and copying the above four stipulations, and the ensuing articles, *verbatim*, was made between Russia and Sweden, on the ^{21 July}_{1 August} 1780, and Sweden and Denmark exchanged declarations, each binding themselves to the Russian treaty with the other, and making the confederacy for mutual defence complete between these three powers. (2)

On the 24th December, 1780, the United Provinces made, at St. Petersburg, a treaty with Russia, in which they acceded to the above treaties with the Northern courts, and issued declarations of their joining in the full extent of the new confederacy. (3)

Before the conclusion of this treaty, however, Great Britain had declared war, on the 20th December, against the United Provinces. By treaties existing between this country and the United Provinces, it had been agreed that the principle that "free ships make free goods" should exist between the two countries; and also an alliance for mutual defence existed, engaging that if either party were attacked, the other party should break with the aggressor in two months from the time of requisition to do so. On France and Spain joining in the American war, such requisition was made by our ambassador, but was evaded by the United Provinces. A hostile feeling was produced by this conduct, and also by the evident favouring of the American cause by the United Provinces; and, on the 17th April, 1780, a declaration was published by our government, announcing that the succours stipulated by the treaty of

Position of
Great Britain
and the United
Provinces.

(1) De Martens, Rec. III. 189
—195.

(2) *Id.* 198—208.

(3) *Id.* 215—222.

1678 never having been afforded by the States General, the provisions of the treaty of commerce of 1674 should be suspended, and the United Provinces treated, no longer in accordance with the privileges there granted, but only on the footing of other neutral nations. (1) Disputes had already taken place between the two countries regarding a squadron commanded by Paul Jones, which had been refitted in the Texel, and also respecting a fleet of merchantmen convoyed by Count Byland, who had been fired at, upon his refusing to submit to search, and the naval materials on board his merchantmen confiscated as contraband, contrary to the provisions of the treaty of 1674. The angry feeling between the two countries was aggravated by the accession of the United Provinces to the Russian Memorial; and a crisis arose upon the capture of Mr. Laurens, formerly president of the American Congress, who was taken by a British ship, and among whose papers were found documents showing that the United Provinces had been in friendly correspondence with the United States ever since 1778, and who had with him a sketch of a treaty of amity and commerce between the United States and the States General, which appeared to be in a train of negotiation, and which was approved by the Pensionary of Amsterdam. (2)

The United Provinces receive no assistance from the confederates, are involved in war, and lose Negapatam.

Soon after the British declaration of war, the States General made application for the assistance stipulated in the new confederacy, in case any member of the alliance should be attacked in consequence of the principles there promulgated. But Sweden, to whom the application was made, replied that the British declaration could hardly be regarded as a consequence of the States General joining the new confederacy, inasmuch

(1) Ann. Reg. 1780, p. 61.

(2) See the British Manifesto, *id.* p. (142.)

as that junction was made after the British declaration of war, the latter being dated London, the 20th December, while the Dutch treaty was dated St. Petersburg, the 24th December. But although not coming within the terms of the treaty for mutual defence, it was possible that the British declaration had been hastened in order to anticipate that contingency, although the conduct of the United Provinces in regard to the Russian Memorial was not noticed in the British Manifesto. Still, if the Northern courts declared war in consequence of our breaking with Holland, they removed all the advantages of neutrality which the confederacy was especially established to promote; while, on the other hand, if the United Provinces were left to their fate, it would seem as if the confederacy had agreed to a convention which they were afraid to carry into execution. Therefore, concluded the Swedish Note, it would be best for the Northern courts to adopt a middle course, and present in their joint names a Memorial to the British court, offering their mediation between Great Britain and the United Provinces. In this proposition Russia acquiesced. (1) But the position of the Northern powers with regard to this country, was not, at that period, the most likely to make an offer of mediation acceptable; and the Dutch, having deserted our alliance for the prospect of a more gainful union, found themselves unsupported by their new confederates, and had to buffet for themselves till the end of the war, and to see their commerce cut up, and some of their colonies taken from them, till they were included in the general peace, in 1783, with the loss of Negapatam.

To return to the acts of accession to the Armed Neutrality. On the 8th May, 1781, a treaty was made between Prussia and Russia, embodying the four articles

Accession of
other courts to
the Armed
Neutrality.

(1) See the correspondence in De Martens, Rec. III. 230—244.

of the new alliance, and establishing Prussia as a member of the confederacy. (1)

On the 10th July, 1781, a similar treaty was made between Russia and the Emperor of Germany. (2)

A similar treaty was made between Russia and Portugal, dated the 13th July, 1782. (3)

And on the 10th February, 1783, the King of the Two Sicilies acceded to the Northern confederacy. (4)

Considerations
on the Armed
Neutrality of
1780.

Thus had all the principal continental powers acceded to the principles of the Armed Neutrality, when its operations were suspended by the general peace of 1783. In whatever point of view we regard this celebrated confederacy, it is difficult to find anything respectable connected with it. Among others, the following observations suggest themselves. I. The abandonment of principle for interest marks the commencement of the Armed Neutrality; an open breach of faith being made by the two powers that first joined Russia in the association. II. The ready manner in which one party of the belligerent States acceded to the novel principles, was itself a proof that these principles were inconsistent with the duties of neutrality, as they evidently assisted one side in the contest, and injured the opposed State, which refused to acquiesce in these pretensions. The declaration of France and Spain therefore, that they approved of the Northern alliance, was a disproof, not a sanction, of the justice of the confederacy; and thus States, with the title of an Armed *Neutrality*, undertook to interfere in the issue of a war, by measures which directly assisted one, and directly injured the other, belligerent. III. A principle which the Northern con-

(1) De Martens, Rec. III. 245.

(3) *Id.* 263.

(2) *Id.* 252.

(4) *Id.* 267.

federacy undertook to establish as a fundamental right of Neutrality, was then for the first time heard of in Europe; for the second article of the statement of principles declares that "free ships shall make free goods," but does not convey the corresponding stipulation that "enemy's ships shall make enemy's goods." The latter engagement is never once referred to in any of the documents creating the Armed Neutrality. But never had there been, among Christian powers, a treaty which conveyed the former immunity without also engaging the latter privilege. One principle had invariably been conveyed in exchange for the other. But the framers of the Armed Neutrality, relying upon the imposing aspect of their union, and upon Great Britain having already to cope with several enemies, defied at once precedent and principle, and attempted to establish by force what their own subsequent conduct proved them not to have regarded as a right, and what never had been claimed as such by any government whatever. IV. The number of the States that joined in the confederacy does not in the least affect the question of the right of the principle which they sought to establish. An universal, or even general, continued acquiescence in any given legal principle, may make it probable that such a principle is based on universal law. But no combination of States can establish that as a part of the Law of Nations which is not dependent upon natural equity, nor can they, rightfully, make the observance of any stipulation incumbent upon any but the contracting parties. A glance at the position of the European powers, at the time of the Armed Neutrality, will destroy any belief that the principles of the confederacy must have been just because they were so generally recognised. Russia, Sweden, Denmark, and the United Provinces, had the most direct and immediate interest in the pretensions which they engaged to defend. Remaining neutral at a time when some of

the greatest commercial States were at war, their shipping interest would be incalculably benefited if they could carry on trade, "not with, but for," the belligerent countries, and transport the property of the subjects of the latter exempt from the capture of the adverse party. On the other hand, France and Spain had equally a direct interest in the principles of the Armed Neutrality, because, from their naval inferiority, they were unable to carry on their commerce themselves, and were glad to commit their property to the safe custody of neutral bottoms if these secured their cargoes from capture. Thus all the principal parties to this alliance were directly interested in the claims thereby advanced. But, as a test of the sincerity of their professions, it will be as well to consider whether these same parties had adhered to these principles before this particular contingency arose, or whether they maintained them after this transient advantage had passed away? With regard to the former, it is notorious that the maritime codes of France and Spain had been of unusual severity, and that so far from sparing enemies' goods on board a neutral ship, they confiscated such neutral ship into the bargain, unless where special treaty came to the rescue of the neutral: and, again, Sweden and Denmark had treaties, which had been in constant force for more than a century, engaging the reverse of the principle of the Armed Neutrality. Thus the conduct of these powers had been in direct contradiction to the novel pretension, *before* the occurrence of this particular opportunity. And with respect to their conduct *after* it, it must be remarked—V., that some of the leading parties to the Armed Neutrality violated its provisions on the very first occasion in which they happened to be belligerents. In the war between Sweden and Russia, in 1788, Gustavus III. renounced the principles of the Armed Neutrality, and Russia followed the example, although not with the same open

profession. (1) And this was done only five years after one of the treaties of the Armed Neutrality, notwithstanding the permanency which was declared to be guaranteed to the new stipulations by art. IX. of the treaty of 1780, an obvious satire being thereby afforded on the motives that led to the confederacy, and to the great scandal of those writers who have advocated the maxims thus attempted to be established. VI. Finally, it must be remarked, that the Armed Neutrality of 1780 was attended by no consequence to Great Britain. Our government never once acceded to the principles therein put forward, but made emphatic remonstrance against admitting such claims. No decisive issue took place between the two parties, the Northern confederates having no case for their joint action against our government, and Great Britain, having already France, Spain, the United States, and the United Provinces to oppose single-handed, was not in a position to take such measures for the vindication of her maritime rights as we shall see she had recourse to on a subsequent occasion.

In most of the treaties following the restoration of peace, the principle that "free ships make free goods," and the converse, was stipulated. Before that period, however, was made the treaty between the United States and the United Provinces, in 1782, where these two stipulations are found in arts. XI. and XII. (2) And in the same year, 1782, was made a treaty of commerce between Denmark and Russia, where the four articles of the Armed Neutrality are embodied in art. XVII. (3) The treaty of Versailles, between France and Great Britain, in 1783, renews the treaty of commerce of 1713, in which the two clauses are inserted, (4) which is also

(1) See Büsch, *Völkerseerecht*, 441.
pp. 34, 36.

(3) *Id.* 474.

(2) De Martens, *Rec.* III. 439,

(4) *Id.* 521.

done in art. II. of the treaty of the same date between Great Britain and Spain. (1) But no such renewal of former treaties was made in our treaty with the United Provinces, in 1784. (2) The two clauses are found in arts. VII. and XIV. of the treaty between Sweden and the United States, in 1783. (3) On the contrary, the treaty of the same year between Russia and the Porte, engages, art. XLIII., that Russian goods on board the ship of an enemy of the Porte shall not be confiscated, nor the merchants made slaves, if they be there for peaceful purposes,—being in accordance with the old rule. This treaty was renewed by the treaty of Jassy in 1792. (4)

In the treaty between Prussia and the United States, in 1785, the twelfth art. engages a treatment similar to the second art. of the Armed Neutrality, that is, it stipulates that the goods of enemies shall be free on board the ships of friends, without conveying the counter stipulation that the goods of friends shall be confiscated if found on board the ships of enemies. (5) The treaty between France and the United Provinces, in 1785, renews, by art. VIII., the articles of the treaty of Utrecht, which stipulated that “free ships make free goods,” and the converse. (6) The treaty between Austria and Russia, of the same year, renews the engagements of the Armed Neutrality, by art. XII. (7) The treaty of commerce between Great Britain and France, in 1786, engages that “free ships make free goods,” and the converse, by arts. XX. and XXIX. (8) The treaty between France and Russia, in 1787, renews the engagements of the Armed Neutrality, by art. XXVII. ; (9) which is also done by the treaty between

(1) De Martens, Rec. III. 543.

(6) *Id.* 68.

(2) *Id.* 560.

(7) *Id.* 76.

(3) *Id.* 568, 572.

(8) *Id.* 168, 172.

(4) *Id.* 635, and V. 293.

(9) *Id.* 210.

(5) *Id.* IV. 42.

Russia and the king of the Sicilies, of the same year, art. XVIII. ; (1) and, again, by the treaty between Russia and Portugal, also of 1787, art. XXII. (2) In a treaty, of the same year, between the United States and Morocco, it was agreed, art. III., that enemies' goods should be free on board neutral vessels ; and also, that neutral goods should be free on board an enemy's vessel. And the same stipulation is made by the treaty between the United States and Tripoli, in 1796, and between the United States and Tunis, in 1797. (3) In the treaty of commerce between France and Ham-
burgh, in 1789, the engagements of the Armed Neu-
trality are stipulated by art. II. (4) In the treaty also
of 1789, between Denmark and Genoa, the engagements
that "free ships make free goods," and the converse,
are agreed to by art. v. and IX. (5)

Such a collection of treaties, agreeing in the principle that the cargo shall be free, or be confiscated, according as the ship is neutral or enemy, seem to go far in establishing, not that this principle was enforced by the Law of Nations independent of treaty, but that it was the general wish of maritime powers that this practice should be adopted, and that it might probably become the conventional law of Europe, among those States, and only those States, which were entering into these engagements.

Their uni-
formity made
a change in the
practice of
Europe pro-
bable.

But such an opinion was soon proved fallacious by the result. Not fifteen years from the date of the Armed Neutrality, the wars with France had involved almost every European State ; and the principle which appeared to be obtaining such general prevalence was

But on the
breaking out
of war, the old
principle was
acted upon.

(1) De-Martens, Rec. IV. 236.

(4) *Id.* IV. 426.

(2) *Id.* 327.

(5) *Id.* 442, 443.

(3) *Id.* 248, and VI. 298, 406.

abandoned by nearly all the members of the Northern Confederacy, the great leader in that alliance, Russia, being the chief instigator of the unusual severities which were adopted towards neutrals.

Wars after the
French Revolution.

France was the first to alter the practice engaged to be observed by the recent treaties. By a decree of the National Convention of 9th May, 1793, enemy's goods on board neutral vessels were declared good prize, the neutral ship being released, and freight being paid by the captors. (1) This was again enforced by a similar decree from the Executive Directory of 2nd March, 1797. (2) On the 8th February, 1793, Russia declared that her treaty with France, of 1786, in which the principle of "free ships free goods," and the reverse, is contained, should be no longer regarded as obligatory, until the restoration of order in France. (3) In the same year Russia renewed with England her treaty of 1766, of which the stipulations are, that neutral commerce shall be carried on "according to the principles and rules of the Law of Nations generally recognised." (4) And on the same day was made another treaty between Russia and Great Britain, engaging that the contracting powers would unite all their efforts to prevent neutrals "from giving, on this occasion of common concern to every civilized State, any protection whatever, directly or indirectly, in consequence of their neutrality, to the commerce or property of the French, on the sea, or in the ports of France." (5) A similar article was inserted in the treaty of the same year between Great Britain and Spain, (6) and in that between Great Britain and Prussia, (7) and in that between Great Britain and the Emperor. (8)

(1) De Martens, Rec. V. 382.

(2) *Id.* 393.

(3) *Id.* 409.

(4) *Id.* 432.

(5) *Id.* 440.

(6) *Id.* 477.

(7) *Id.* 485.

(8) *Id.* 489.

Thus, on the first occasion on which the principle was to be applied to themselves, we see that the principles of the Armed Neutrality were abandoned, by Sweden (in the war of 1788), by Russia, by France, by Spain, by Prussia, and by the Emperor.

Abandonment
of the prin-
ciples of the
Armed Neu-
trality.

In the treaty of 1795, between Great Britain and the United States, it is agreed, art. xvii., that the property of enemies found on board the ships of neutrals shall be taken from them, and that the ship and the remainder of the cargo shall be allowed to proceed without any impediment. (1)

But in the treaty of the same year between the United States and Spain, directly the reverse is stipulated by art. xv., which declares that cargoes in neutral ships are to be free, "no distinction being made as to who are the proprietors of the merchandizes laden thereon." (2)

In the treaty of commerce between Great Britain and Russia in 1797, no alteration is made in the old rule, the tenth art., which respects neutral commerce, being silent on this question. (3)

But in the treaty of the next year, 1798, between Russia and Portugal, it is agreed, by art. xxiv., "that free ships shall make free goods," and that neutral goods in an enemy's ship shall be confiscated. (4)

In 1799, the United States declared in their treaty with Prussia, art. xii., that "experience having proved, that the principle adopted in the twelfth article of the treaty of 1785, according to which 'free ships make free goods,' has not been sufficiently respected during the two last wars, and especially in that which still continues;

(1) De Martens, Rec. V. 672.

(3) *Id.* 362.

(2) *Id.* VI. 154.

(4) *Id.* 550.

the two contracting powers propose, after the return of a general peace, to agree, either separately between themselves, or jointly with other powers alike interested, to concert with the great maritime powers of Europe such arrangements, and such permanent principles, as may serve to consolidate the liberty and the safety of neutral navigation and commerce in future wars. And if, in the interval, either of the contracting parties should be engaged in a war in which the other should remain neutral, the ships of war and privateers of the belligerent power shall conduct themselves towards the merchant vessels of the neutral power as favourably as the cause of the war then existing may permit, observing the principles and rules of the Law of Nations generally acknowledged.”(1)

But in the treaty made the next year, 1800, between the United States and France, the principle that “free ships make free goods,” and that neutral property in enemy’s ships shall be confiscated, is stipulated by arts. XIV. and XV. (2)

Armed Neu-
trality of 1800.

We now come to the period when, by the second Armed Neutrality, in the year 1800, an attempt was again made to force on this country the recognition of the principle that “free ships make free goods.” The second Armed Neutrality differs from the first in many important particulars: it had its origin in discussions regarding the right of searching merchants’ ships sailing under the protection of convoy,—which will be considered in a subsequent chapter on the Right of Search. The irritation produced by this discussion had been aggravated by the capture, under questionable circumstances, of two Spanish frigates by the British, who had taken possession of a Swedish ship in the port

(1) De Martens, Rec. VI. 676.

(2) *Id.* VII. 103.

of Barcelona, during the night, and under cover of her neutral flag had surprised and taken two Spanish frigates lying under the batteries of Barcelona. These differences might, however, have been amicably terminated, but for the disappointment of the Emperor of Russia regarding the island of Malta, which he expected to have had given up to him by the British. Lord Whitworth, who had been sent to Copenhagen on a special mission regarding the Danish convoy, had concluded, on the 29th August, 1800, a convention, in which that dispute was adjusted in a friendly manner. (1) But before this could be known at St. Petersburg, the Emperor Paul had issued a declaration, dated $\frac{16}{27}$ August, inviting the courts of Sweden, Prussia, and Denmark, to re-unite in a confederacy for an Armed Neutrality, and giving the British conduct in regard to the Danish convoy as a reason for such an alliance. On learning that the British squadron, sent to support the representations of Lord Whitworth, had passed the Sound, the Emperor Paul laid an embargo on all British property in his dominions, which embargo was taken off on the convention between Great Britain and Denmark being known at St. Petersburg. (2)

On the surrender of Malta to the British in September, 1800, the Emperor Paul claimed this island from our government, alleging his convention of 1798, in which, however, there was not a single clause, affording not only a reason, but even a pretext, for such a demand. (3) It will be remembered that Paul had become Grand Master of the Knights of Malta, a fantastic attachment to that order being one of the many points which gave colour to the suspicion of his insanity. Vexation at the refusal of the British to

Edict of the
Emperor Paul.

(1) De Martens, Rec. VII. 149.

(2) *Id.* 150—154.

(3) See the treaty, which is a treaty of subsidy, *id.* VI. 557.

comply with his request, induced him to resort to the first means that offered of injuring this country, and in spite of the treaty between Great Britain and Russia, of which the twelfth art. expressly forbade that, in case of rupture, the goods or persons of the subjects of either country should be detained or confiscated, he laid an embargo on all British property in his dominions ; and a British merchantman having managed to escape from Narva, he ordered that another British vessel should be burned. (1)

Treaty between Russia and Sweden.

While in this state of incipient hostility, Russia concluded with Sweden, on the $1^{\frac{4}{8}}$ December, 1800, a treaty renewing the confederacy for an Armed Neutrality. The principles declared to be established by this treaty, art. III., were as follows :—

I. That any vessel may freely sail from port to port, and on the coasts of nations at war.

II. That property belonging to the subjects of belligerent powers shall be free on board the ships of neutrals, excepting goods that are contraband.

III. That to determine what constitutes a blockaded port, this term shall only be allowed to ports where, from the arrangements of the power which is attacking, with vessels stationary and sufficiently close, there is an evident danger in entering ; and that any vessel sailing towards a blockaded port shall not be regarded as contravening the present convention, unless, after having been warned of the state of the port by the commander of the blockading squadron, she shall attempt to enter, employing either force or fraud.

(1) De Martens, Rec. VII. 155.

IV. That neutral vessels may not be detained except on just grounds and evident facts; that they shall be adjudged without delay, that the process shall always be uniform, prompt, and legal; and that in every instance, besides an indemnity to parties who have suffered loss without having committed wrong, there shall be afforded a complete satisfaction for the insult offered to the flag of their majesties.

V. That the declaration of the officer commanding the ship or ships of the royal or imperial navy, accompanying a convoy of one or more merchant ships, that his convoy has not on board any goods that are contraband, shall suffice to prevent there being any visitation for search on board his ship or the ships of his convoy.

By subsequent articles mutual assistance is promised in case of attack. (1)

Articles to the same effect were engaged by a treaty, of the same date, between Russia and Denmark, (2) and, two days later, by a treaty between Russia and Prussia. (3)

Acceded to by
Denmark and
Prussia.

An account of subsequent proceedings regarding this confederacy is given in the present treatise, in the chapter on the Right of Search, to which the article on Convoy seemed to make the discussion most properly belong. It will be only necessary here to recapitulate that, the above-named States having joined themselves to a power, *after* it had placed itself in a situation of equivocal amity with this country, an embargo was laid upon Danish and Swedish, as well as Russian property, in British ports. Subsequently the battle of Copenhagen took place, the Emperor Paul was assassinated, and the Emperor Alexander, immediately on his accession, made a treaty, which adjusted the dispute with Great Britain.

Result of the
Armed Neu-
trality of 1800.

(1) De Martens, Rec. VII. 172.

(3) *Id.* 188.

(2) *Id.* 181.

In this treaty, dated $\frac{5}{17}$ June, 1801, Great Britain acceded to the proposals of the Northern courts regarding convoy, and Russia agreed to the old principle, that neutral ships should not protect enemies' property. By art. III. § 2, it was agreed that goods embarked in the ships of neutrals shall be free, excepting contraband of war *and the property of enemies*. To this treaty Denmark and Sweden afterwards acceded. (1) Thus the principle that "free ships make free goods," had been attempted to be enforced by a confederacy which was broken by a single maritime power, and the principle of the old rule was vindicated and re-established. In the first Armed Neutrality, Great Britain, though she never acquiesced in the pretensions of that confederacy, and formally protested against them, yet had too many foes at the same time to make an addition to them expedient. But, in the second Armed Neutrality, we were enabled to shew that we would not permit maritime rights to be invaded by confederates united to subvert the Law of Nations for their own selfish purposes; we forced an abandonment of principles which these confederates united to defend; and Nelson's glory at Copenhagen was of the purest character, arising from valour successfully exercised in the vindication of justice.

Russian treaty
with Sweden.

A treaty embodying the five articles of the second Armed Neutrality, was made between Russia and Sweden on the $\frac{1}{3}$ of March, 1801, (2) that is, before the attack on Copenhagen, and ratified at St. Petersburg on the ^{30 May}_{11 June}, that is, after the signature of the above-named treaty between Russia and Great Britain. This merely shews how completely impossible it is to deduce anything like a system from the treaties of nations regarding the principle of "free ships free goods;" Russia, the leader in both the Armed Neutralities,

(1) See the three treaties, De Martens, Rec. VII. 260—281. (2) *Id.* 329.

making, in the instances before us, a treaty embodying one principle with Great Britain, while she ratified, in the very same week, a treaty with Sweden containing exactly the reverse principle.

Russia has indeed little merit of consistency to vaunt in her treatment of neutral commerce. As long as she was herself neutral, she employed all her weight to enlarge the profits of neutrality; but she no sooner became belligerent than she pressed with unusual severity upon the commerce of neutrals. We have already seen her conduct in her war with Sweden, and in the treaties for preventing all trade with France in 1793,—acts which were perhaps justified by the circumstances, but which are in strange contrast with her former professions. And the same remark applies to her ukase of August, 1809, which declares, art. II., that “ships laden in part with goods of the manufacture or produce of hostile countries shall be stopped, and such merchandize confiscated and sold by auction for the profit of the crown. *And if the merchandize aforesaid compose more than half the cargo, not only the cargo, but also the ship shall be confiscated.*” (1)

Considerations
on the conduct
of Russia.

The United States have recently made some treaties which leave this question to be settled on the footing of reciprocity. In 1816, they renewed with Sweden articles of their treaty of 1783, which declare that “free ships make free goods;” (2) and in 1828, they renewed with Prussia the twelfth art. of their treaty of 1785, which embodies the same principle. (3) But in their treaty with Spain, in 1819, art. XII. declares that, “with respect to the fifteenth article of the same treaty of 1795, in which it is stipulated that the flag shall cover the property, the two high contracting parties agree,

Treaties of the
United States.

(1) De Martens, Supp. V. 485.

(3) *Id.* XI. part II. 619.

(2) *Id.* Supp. VIII. 258.

that this shall be so understood with respect to those powers who recognise this principle; but if either of the two contracting parties shall be at war with a third party, and the other neutral, the flag of the neutral shall cover the property of enemies whose governments acknowledge this principle, and not of others.” (1) The same stipulation is made in their treaty with Columbia, in 1824, (2) and in their treaty with Central America, in 1825. (3) No express renewal of our former treaties with America took place at the restoration of peace; nor were any of the treaties by which Great Britain had formerly engaged herself to maintain the principle that “free ships make free goods,” renewed at the general peace; nor am I aware of any treaty comprising this principle existing at present between Great Britain and any Christian power.

[The recent history of this subject dates from the Declaration annexed to the Treaty of Paris of 1856, and the circumstances which led up to it. On the breaking out of the Crimean war, France and England, then in alliance, came to terms as to the treatment of neutral commerce and enemy's goods on board neutral ships. France gave up her principle, for the duration of the war, that enemy's ships make enemy's goods. England, on the other hand, gave up for the same period her principle that free ships do not make free goods. An English declaration, dated March 28th, 1854 (afterwards re-enforced by an Order of Council, April 15th), announced that her Majesty was “desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace;” that “to preserve the commerce of neutrals from all unnecessary obstruction, her Majesty was willing to waive a part of the

(1) De Martens, Supp. IX.
part I. 343.

(2) *Id.* X. part II. 994.

(3) *Id.* 832.

[“ belligerent rights appertaining to her by the Law of Nations;” that it was impossible for her Majesty to forego the right of seizing contraband, and maintaining the rights of blockade; but her Majesty “ would waive the right of seizing enemy’s property laden on board a neutral vessel, unless it be contraband of war;” that it “ was not her Majesty’s intention to claim the confiscation of neutral property, not being contraband of war, found on board enemies’ ships;” and that it was not her Majesty’s present intention to issue letters of marque for the commissioning of privateers.

The practice both of the English and French government during this war was finally embodied in the Declaration annexed to the Treaty of Paris of 1856, signed by the representatives of France, Austria, Prussia, Russia, Sardinia, Turkey, and England, and to which about forty other States have since given in their adherence. The circumstances under which the United States refused their adhesion under any terms short of the entire exemption of private merchandize from belligerent seizure, have been noticed in a previous note on the subject of Privateering.* The terms of the Declaration are the following:—

“ The plenipotentiaries who have signed the Treaty of Paris of the 30th of March, 1856, re-assembled in conference, taking into consideration—

“ “ That maritime law, in time of war, has been for a long time past the subject of disputes much to be regretted;

“ That the uncertainty of the law, and the duties arising under it, gives occasion, as between neutrals and belligerents, to divergencies of opinion which are likely to give birth to serious difficulties and even conflicts;

* See p. 157.

[" That, consequently, it would be advantageous
" to settle once for all an uniform doctrine on so
" important a point ;

" That the plenipotentiaries assembled in con-
" gress at Paris, could not better carry out the
" intentions of their governments than in trying to
" introduce into international relations fixed prin-
" ciples in this respect ;

" The said plenipotentiaries, being duly autho-
" rized thereto, have agreed to join in devising
" means to attain this end, and having come to
" terms, have hereby published the solemn decla-
" ration, following :

1. " Privateering is hereby and shall continue
" abolished. (*La course est et demeure abolie.*)

2. " The neutral flag covers enemy's mer-
" chandize, excepting contraband of war.

3. " Neutral merchandize, excepting con-
" traband of war, cannot be seized if under an
" enemy's flag.

4. " Blockades, to be binding (on neutrals)
" must be effectual, that is to say, maintained
" by a force sufficient really to prevent access to
" the shore line by the enemy.'

" The governments of the plenipotentiaries, whose
" names are subscribed, engage to bring this declara-
" tion to the knowledge of those States which have not
" been summoned to take part in the congress, and to
" invite them to accede to it.

" Convinced that the maxims they have proclaimed
" can only be received with gratitude by the whole
" world, the plenipotentiaries undersigned have no
" doubt that the efforts of their governments to make
" the adoption of the maxims general will be crowned
" with complete success.

" The present Declaration is, and will be held,
" obligatory only as between the powers which have
" already acceded, or may hereafter accede to it."

[The expediency of England joining in this Declaration, and her duty and wisdom in adhering to it, have more than once been matters of grave debate in the Houses of Parliament, the last occasion being that on the motion of Mr. Baillie Cochrane on April 13th, 1875, alluded to in a previous note (see p. 157).

The main error that runs through the reasoning of most of those who advocate a repudiation on the part of England of this Declaration arises from the omission to notice the historical facts out of which it arose, and the complementary parts of which it consists. The question is not whether England has lost much by the Declaration, but whether (1) she has not gained more, the clauses respecting the abolition of privateering and the enforcement of rigid blockades being distinctly in favour of a State possessing enormous naval force and an unrivalled mercantile marine ; and again (2) whether England could long, in the face of European opinion, have retained what, by the Declaration, she willingly gave up.]

Thus have I endeavoured to trace this question Conclusion.
through its various branches of equity and of history. The length of the disquisition I regret ; but the great importance of the question to British interests, and its being almost identified with our success in naval warfare, makes the length pardonable if it has been necessary ; and I shall not regret having risked the being tedious, if the reader is satisfied that the proofs have been complete.

CHAPTER VII.

CONTRABAND OF WAR.

Principles
regulating
Contraband of
War.

THE right of belligerents to prevent neutrals from carrying to an enemy articles that may serve him in the direct prosecution of his hostile purposes has been acknowledged by all authorities, and is obvious to plain reason. It is no interference with the right of a third party to say that he shall not carry to my enemy instruments with which I am to be attacked; such commerce is, on the other hand, a deviation from neutrality, or rather would be so if it were the act of a State, and not of individuals. It is further the clear right of a belligerent to attempt to reduce an enemy by straitening his resources; a right which is only limited by the contingency of lesion to the rights of those who are not parties in the contest. The non-recognition of this right would involve the absurdity of making it, in many cases, impossible to reduce an enemy by paralyzing his means; and would place it in the power of neutrals to interfere directly in the issue of wars,—those who, by definition, are not parties in the contest thus receiving a power to injure a belligerent, which even if direct enemies they would not possess. At the same time, neutrals retain the full right of carrying to an enemy (except in the case of blockade) goods which do not affect him in his belligerent character; the articles excepted and forbidden to be carried being what is called *Contraband of War*.

Different
limitations of
Contraband of
War.

To this term very different limitations have been assigned at different periods. This is partly occasioned by the nature of the right; as it may injure a belligerent,

under certain circumstances, to carry to his enemy articles which, under other circumstances, would be perfectly harmless. Of this a good illustration is given by Mr. Ward in the case of hides, which are in themselves an innocent article of traffic, but in such a conjuncture as where floating batteries designed for an attack on Gibraltar were being constructed at Algeziras, and hides were used as a chief article in the fitting out of that armament, we should be justified in stopping, if not in confiscating, hides carried to that port of equipment. (1) But it is not merely the nature of the subject which has introduced uncertainty into the definition of contraband. The same States have, at different periods, made quite contrary stipulations on the subject ; and it is not at all unusual to find the same State contracting different engagements regarding contraband at the same time with different powers.

Nor is there any thing like uniformity in the opinions of the text-writers upon contraband. Grotius divides goods carried to an enemy into three classes—those which are only useful in war, as arms, &c. ; those which have no use but as articles of luxury ; and those which are useful both in war and peace, as money, provisions, ships, and naval materials. With regard to the first, Grotius says that that person is on the side of the enemy who carries to him the necessaries of war. With regard to the second, there can be no dispute. With regard to the third class, comprising articles doubtful on account of their double service in peace and war, a distinction is made by the state of the war. If the seizure of such goods is requisite for my defence, necessity confers the right of intercepting them, but there must be restitution made unless other causes justify confiscation. Intentional interference with a belligerent's rights justifies capture

The text-writers not uniform.

Opinion of Grotius.

(1) Ward's Essay on Contraband, p. 248.

of the offending cargoes; and if my enemy's injustice towards me be evident, assistance given him is a crime, and justifies confiscation. (1)

Of Bynkershoek.

Bynkershoek, after quoting the above opinion, says that instruments of war, and materials directly adapted for war, are contraband. He does not include under this title every thing that may be used for warlike purposes; which, he says, would include so large a list as practically to interdict nearly all commerce; but he says that it is occasionally lawful to intercept naval stores and materials, if the enemy is much in want of them, and cannot easily carry on the war without them. (2)

Of Vattel.

Vattel is much more explicit in his definition of contraband. After claiming for neutrals the full right of trading with a belligerent in goods that have no relation to war, he says, that such as are useful in war must not be carried to a belligerent; and such contraband goods are, he says, arms, ammunition, timber for ship-building, every kind of naval stores, horses, and even provisions, in certain junctures, when we have hopes of reducing an enemy by famine. (3)

His catalogue not always recognised.

But this list does not universally obtain as an acknowledged catalogue of contraband, and it will be necessary to examine rather more in detail what articles are reputed contraband; and then consider their treatment when found on a voyage to an enemy, and the effect which the carrying such goods has on the vessel engaged in the transport.

What arms are contraband.

There are two or three old treaties in which even arms are allowed to be freely carried to an enemy.

(1) Grotius de Jure, lib. III. lib. I. c. x.

cap. I. § 5.

(3) Vattel, liv. III. ch. vii.

(2) Bynk. Quæst. Jur. Pub. § 112.

Such is the treaty between Cromwell and Portugal, in 1654, which, by the 10th article, stipulates such freedom for the people of this country. (1) But articles which are at the present day, by universal consent, allowed to be contraband, are such as pertain immediately to military service,—“cannons, mortars, fire-arms, pistols, bombs, grenades, bullets, balls, muskets, flints, matches, powder, saltpetre, sulphur, cuirasses, pikes, swords, belts, cartouch-boxes, saddles and bridles, beyond the quantity necessary for the use of the ship.” These words are quoted from the treaty between Great Britain and Russia, in 1800; (2) and comprise what would be considered contraband in the strictest limitation of the term, with the exception that sulphur is not so frequently specified as saltpetre in articles on contraband.

Horses, though by no means universally allowed to be *Horses*. seized as contraband, are mentioned, in a very considerable number of treaties, as liable to confiscation, their immediate connection with military service pointing them out as objects of jealousy to belligerents. They are mentioned as contraband in the following treaties; that between Louis XIV. and the Hanse Towns, in 1655; (3) in the treaty of the Pyrenees, in 1659; (4) between England and Sweden, in 1661; (5) between France and the United Provinces, in 1662; (6) between England and Spain, in 1667; (7) between Sweden and the United Provinces, in 1667; (8) between the same (renewed) in 1675; (9) between England and United

(1) Chalmers, II. 272. Similar treaties between England and the Duke of Brittany in 1468, and between Portugal and the United Provinces in 1661, are mentioned by De Martens, Précis II. § 318, note (a).

(2) De Martens, Rec. VII. 262.

(3) Dumont, Corps Dip. VI. II. 103.

(4) *Id.* 266.

(5) *Id.* 385.

(6) *Id.* 414.

(7) *Id.* VII. i. 81.

(8) *Id.* 37.

(9) *Id.* 317.

Provinces, in 1667; (1) between England and Spain, in 1667; (2) between Denmark and United Provinces, in 1701; (3) by the treaty of Utrecht, in 1713; (4) by the treaty between France and Hambro, in 1769; (5) between France and America, in 1778; (6) between England and Denmark, in 1780; (7) between United States and Holland, in 1782; (8) between Sweden and the United States, in 1783; (9) between England and France, in 1786; (10) Denmark and Genoa, 1789; (11) Spain and United States, in 1795; (12) England and Portugal, 1810. (13) Instances might be multiplied, but these are sufficient to shew that horses have been looked upon as contraband, at different times, by *all* the principal maritime powers, excepting Russia, in whose treaties with us and with other powers horses are not, and, I believe, never have been, included in the list of contraband.

Metals and money.

Unwrought metals, and coined money, have, in a few treaties, been included in the list of contraband. In a treaty between the States General and Lubeck, in 1613, it was agreed that neither should furnish munitions of war, &c., *nor money* to the enemies of the other: (14) and the same stipulation is made in a treaty between the States General and Gustavus Adolphus, in 1614; (15) and in a treaty between the States General and the Hanse Towns, in 1615. (16) In a treaty between Great Britain and the United Provinces, in 1625, gold, silver,

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| (1) Dumont, Corps Dip. VII. | (9) <i>Id.</i> 569. |
| i. 49. | (10) <i>Id.</i> IV. 169. |
| (2) Chalmers' Coll. II. 18. | (11) <i>Id.</i> 442. |
| (3) Dumont, Corps Dip. VIII. | (12) <i>Id.</i> VI. 156. |
| i. 35. | (13) <i>Id.</i> Supp. VII. 211. |
| (4) <i>Id.</i> 348. | (14) Dumont, Corps Dip. V. II. |
| (5) De Martens, Rec. I. 641. | 233. |
| (6) <i>Id.</i> II. 598. | (15) <i>Id.</i> 247. |
| (7) <i>Id.</i> III. 177. | (16) <i>Id.</i> 276. |
| (8) <i>Id.</i> 451. | |

copper, iron, and lead, are declared contraband; (1) in a treaty between the same parties in 1654, money is one of the articles that is not to be afforded by one party to the enemies of the other. (2) By the treaty of peace at Breda, in 1667, between the same parties, money was one of the articles which it was agreed that neither should furnish to the *rebels* of the other; (3) but this article (XIII.) is expressly declared not to be the limitation of contraband, and in the commercial treaty between the same parties, at the same time, money and the metals are no longer mentioned in the list of contraband. (4) In the treaty of 1661, between Great Britain and Sweden, money is declared to be contraband; (5) and this article was declared to be still in force by the treaty of 1803; but in the treaty between Sweden and the United Provinces, in 1677, money is declared not to be contraband. (6) By the treaty of Utrecht, in 1713, gold and silver, both coined and uncoined, as well as the other metals, and also coals, are declared not contraband (art. xx.). (7) Unwrought iron is expressly excepted by the treaty between Great Britain and Denmark, in 1670. (8) Money is excepted from the list of contraband in our treaty with France, in 1786; (9) and in the treaty between Spain and the United States, in 1795. (10) Sweden specified money as an article of contraband in her instructions to her cruisers, in 1788; but afterwards, in consequence of the remonstrances of the States General, the order was rescinded in 1790. (11)

From these instances, I think it is evident, that, with

(1) Dumont, Corps Dip. V. II.
480.

(2) *Id.* VI. II. 74.

(3) Chalmers, I. 138.

(4) *Id.* 154, confirmed at the
Hague in 1668, *id.* 163.

(5) *Id.* I. 52.

(6) Dumont, VII. I. 37.

(7) *Id.* VIII. I. 348.

(8) Chalmers, I. 98.

(9) De Martens, Rec. IV. 169.

(10) *Id.* VI. 156.

(11) *Id.* IV. 395.

the exception made by the Swedish treaty with this country, there is no case to be made for including money and unwrought metals in the list of contraband. In the Dutch treaties, though the rule once obtained, it was altered after very short duration, and in other treaties the articles have, for two centuries, only been mentioned in order to be excepted. Nor can it be said in this or in any other case of contraband that the exception proves the rule, (1) since, in treaties regarding contraband, the limitation is usually strict, expressly defining what are contraband *solely*, or with an addition asserting what articles are not to be deemed contraband. With regard to money and *unwrought* metals, it may then be deemed the rule that they are not contraband, the Swedish treaty forming an exception, as neither the opinions of writers on the Law of Nations, nor usage, as deduced from treaties, place them under that category.

Naval stores
and materials.

With regard to naval stores, and materials for ship-building, and also ships, very considerable difference has existed in treaties specifying contraband. In the above cited treaties between the States General and Lubeck and Sweden and the Hanse Towns, in 1613, and the two following years, ships are mentioned as not to be furnished to the enemies of either party. In the treaty of 1625 between Great Britain and the United Provinces, ships, sails, and cordage are specified as contraband. Between the same powers, in 1654, ships are not to be furnished to the enemies of either party. In the treaty between Louis XIV. and the Hanse Towns, in 1655, cordage and sail-cloth are specified as contraband. Ships are specified as contraband in our treaty with Sweden of 1661. In the treaty between Sweden and the United Provinces, in 1667, materials

(1) Rob. Rep. I. 92.

of naval equipment, as masts, planks, anchors, pitch, &c., are expressly excepted from the list of contraband, with, however, the remarkable stipulation, that, as the Dutch were engaged in a naval war with England at the time, they should be allowed to seize and confiscate (not even bring in for pre-emption*), the naval stores above mentioned going from Sweden to England. In our treaty with Denmark, in 1670, the third article specifies as contraband "ships, or other necessaries for the use of war," which the explanatory treaty of 1780, (1) declares to include ship-timber, tar, pitch, sails, canvas, and cordage, and whatever serves directly for the equipment of vessels, including sheet-copper;—unwrought iron, as before mentioned, and deal-planks, being excepted from the list. In the treaty between Great Britain and the United Provinces, in 1664, naval stores are expressly *excepted* from the list of contraband. (2) In 1701, naval stores are *declared* contraband in the treaty between the United Provinces and Denmark. (3) By the commercial treaty at Utrecht, in 1713, between France and Great Britain, naval stores are *excepted* from the list of contraband. (4) In the treaty between Russia and the United Provinces, in 1715, naval stores are *declared* contraband. (5) Naval stores are *excepted* from the list of contraband in the treaty between the United States and France, in

(1) Compare Chalmers, I. 79, and 97, 98. The treaties in this paragraph in which no reference is given have already been cited in the preceding paragraphs on contraband.

(2) Dumont, Corps Dip. VII. 1. 283.

(3) *Id.* VIII. 1. 35.

(4) *Id.* 348.

(5) *Id.* 469.

[* Pre-emption is a right occasionally claimed by the government of a belligerent State of buying for its own use articles which either might be confiscated as being contraband, or as being, for the moment, owing to special circumstances, put in the same category as contraband. The nature and limitation of the right are described in the next chapter.—ED.]

1778; (1) also in treaty between Great Britain and France, in 1786; (2) in treaty between Denmark and Genoa, in 1789; (3) and in treaty between the United States and Spain, in 1795; (4) but in treaty of the year before, 1794, between the United States and Great Britain, naval stores of every description are *declared* contraband. (5)

By the above references it is shown that nothing like a general law has obtained either for including or excluding naval materials as articles of contraband. So far, indeed, from there being any general law, we see, from the above citations, that the same powers declare naval materials to be contraband in one treaty, and declare them not to be contraband in a succeeding treaty. We also see instances of a government declaring these goods contraband in its treaties with one power, and excepting them from the list of contraband in treaties in force at the same time with another power.

Our own
practice re-
garding naval
stores.

In this contradiction of authorities, some writers on the Law of Nations declaring that materials of naval architecture are liable to confiscation as contraband, and some that they are not so liable—and usage, as deduced from treaties, being variable and indecisive,—our prize-courts have adopted a system, which appears based on reason and moderation, of distinguishing, in cases where we have no treaties declaratory on the subject, between instances where such articles are the produce of the country from which they had been exported when seized, and those instances in which they were not the produce of the country where they had been last shipped. In the latter case they would be seized and confiscated; but in the former they would not be confiscated,

(1) De Martens, Rec. II. 599.

(2) *Id.* IV. 169.

(3) *Id.* 443.

(4) *Id.* VI. 158.

(5) *Id.* V. 674.

but would be liable to be brought in for pre-emption.* This relaxation is grounded on the apparent hardship of preventing a country from exporting goods which may be the staple articles of its native produce, and of its usual commerce. Such is the rule adopted with regard to pitch and tar; (1) while with other articles a distinction is observed regarding their being in a manufactured or unmanufactured state; "thus iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband; and hemp is more favourably considered than cordage." (2) Another distinction is grounded by our courts on the consideration whether goods of the above doubtful character are destined to a military use, or are intended merely for ordinary civil purposes; the latter case being treated favourably, the former with rigour. In ascertaining this final purpose, the port of the ship's destination is the test usually resorted to, the difference being marked between a merely commercial port and a port of naval equipment. (3) These distinctions appear to be fair and reasonable, and to follow as equitable deductions from the right of belligerents to prevent neutrals from assisting an enemy; the right of neutrals, at the same time, remaining unimpaired to prosecute commerce as freely as ever, with the exceptions made by such interference. Chancellor Kent says, that the government of the United States "has frequently conceded that the materials for the building, equipment, and armament of ships of war, as timber and naval stores, are contraband." (4)

On the subject of Provisions rather less doubt seems to exist than on the articles last considered, it appearing

(1) Rob. Rep. I. 241.

(2) *Id.* 194.

(3) *Id.* 195.

(4) Kent's Commentaries on American Law, Abdy's edition, ch. ix. p. 355.

[* See note * on page 359.]

to be the acknowledged rule that they are not contraband, though under peculiar circumstances they may become so. Grotius speaks of them as articles *ancipitis usus*, and says, that they may become contraband by peculiar circumstances, such as an attempted relief of places in distress. Vattel's opinion has been already cited, that Provisions may become contraband upon certain occasions, when it is hoped to reduce an enemy by famine. The usages of nations, and also the declarations of treaties, have been far from uniform on this subject. Custom appears to have been less favourable to Provisions formerly, the rule having gradually relaxed, as will appear from the following citations. In the curious treaty for the neutrality of Burgundy, in 1522, (a treaty subsequently renewed at various times, the last being, according to Dumont, in 1609,) it was agreed, that this province should not be made the scene of war, nor otherwise molested, as long as it observed neutrality, and *Provisions* are among the articles which it is not to furnish to either belligerent. (1) In a similar treaty between France and Spain, in 1596, for the neutrality of Lorraine, it is declared that Provisions, if furnished to one party, are to be furnished to the other also. (2) Queen Elizabeth would not permit the Poles and Danes to carry Provisions to Spain, declaring that, by the rights of war, it was permitted to reduce an enemy by famine to seek for peace. (3) In the three treaties, already noticed, between the States General and Lubeck, Sweden, and the Hanse Towns, in 1613 and the two succeeding years, Provisions are forbidden to be furnished to the enemies of either party. Provisions are also specified as contraband in the treaty of 1625, between England and the United Provinces. (4) In 1650, however, the United Provinces, in treaty with Spain, except grain, salt, wine, and Provisions

(1) Dumont, IV. i. 380.

(3) Causes Célèbres, II. 334.

(2) *Id.* V. i. 527.

(4) Dumont, V. II. 480.

generally, from the list of contraband. (1) But again, in 1654, it is agreed by the United Provinces, in treaty with Great Britain, that Provisions shall not be furnished to the enemies of either party. (2) But the rule was now becoming more lenient; De Witt gave it as his opinion, in 1654, that Provisions ought not to be considered contraband; (3) and in 1655, in a treaty with the Hanse Towns, Louis XIV. declared that Provisions were not contraband, unless when carried to a town or place attacked, an exception which is the more remarkable, as this is a treaty of some strictness and rigour in this regard, cordage and sail-cloth being inserted in the list of contraband. (4)

An exception to the rule then beginning to obtain is made by our treaty with Sweden in 1661, in which Provisions are declared seizable as contraband. (5) But this isolated precedent is overborne by a great number of treaties in which the opposite principle is asserted. Provisions are declared not to be contraband in the treaty of the Pyrenees, in 1659, (6) in the treaty between France and the United Provinces, in 1662; (7) between Great Britain and Spain, in 1667; (8) between Sweden and the United Provinces, in 1667; (9) and also between Great Britain and the United Provinces, in the same year. (10) They are not included as contraband in our treaty with Denmark, in 1670, already cited, in which naval materials are declared contraband, and they are expressly excepted from the list of contraband in the commercial treaty of Utrecht, in 1713, between Great Britain and France. (11) Before this

(1) Dumont, VI. i. 570.

(2) *Id.* II. 74.

(3) Letter dated 4th January, 1654, quoted by Marshall in his *Marine Insurance*, b. I. ch. III. § 3.

(4) Dumont, VI. II. 103.

(5) *Id.* 385.

(6) *Id.* 266.

(7) *Id.* 414.

(8) *Id.* VII. i. 81.

(9) *Id.* 87.

(10) *Id.* 49.

(11) *Id.* VIII. i. 348.

time, however, Marlborough recommended Godolphin, in 1709, to prevent corn from being carried to France, then suffering from famine; (1) a measure which is believed to have increased the number of the French soldiers, as Louis XIV. is said to have predicted, in the words, "hunger will compel my subjects to follow my bread-waggon." (2) This precedent, it may be remarked, from the famine existing in France at the time, comes under the category noticed by Grotius and Vattel as justifying the seizure of Provisions as contraband, namely, the expectation that so doing may compel the enemy to sue for peace. Another precedent of Provisions being treated as contraband, is afforded by the manifesto issued by the Russian admiral in the war with Turkey in 1772, in which it is declared that Provisions going to the enemy shall be seized and confiscated as contraband. (3) Among later instances, Provisions are declared not to be contraband, in the treaty between France and the United States, in 1778; (4) in that between France and Mecklenburgh-Schwerin, in 1779; (5) in that between Great Britain and Denmark, in 1780; (6) in that between Denmark and Genoa, in 1789; (7) in that between Great Britain and France, in 1786; (8) and in that between Spain and the United States, in 1795. (9)

Provisions declared contraband in the last great war.

Such was the state of International Law on the subject of condemning Provisions as contraband, when the great war ensuing from the French Revolution broke out. The unusual bitterness which marked that contest extended to the subject which we are now considering. It need hardly be recalled to the reader, that

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| (1) Cox's Marlborough, III. | (5) <i>Id.</i> 714. |
| 41. | (6) <i>Id.</i> III. 177. |
| (2) <i>Id.</i> 49. | (7) <i>Id.</i> IV. 442. |
| (3) De Martens, Rec. II. 36. | (8) <i>Id.</i> 169. |
| (4) <i>Id.</i> 599. | (9) <i>Id.</i> VI. 156. |

at the beginning of that war France was suffering from a severe famine; and one of the means employed in attempting to reduce the French to desire peace, was a systematic league between most of the principal powers, having for its aim to increase the distress of the people, and so make them weary of the war, by preventing the entrance of any foreign provisions into France. It has been above stated that, by our treaty of 1786 with France, Provisions were not to be considered as contraband. The obligation of this treaty had however entirely ceased, as the French Convention had decreed, on the 1st March, 1793, that "all treaties of alliance or of commerce existing between the former French government and the powers with whom the republic is at war, are annulled," (1) a decree which of course absolved Great Britain from the duty of observing the contracts so discarded. On the 25th March, 1793, a treaty was signed in London between Great Britain and Russia, of which the third article declares that the High-Contracting-Powers will not permit "the exportation, in any case, from their said ports for France of any military or naval stores, or corn, grain, salt-meat, or other provisions." (2) In a treaty between Great Britain and Spain on the 25th May, 1793, the fourth article contains a similar restriction as to "military and naval stores, wheat or other grain, salt-fish or other provisions." (3) A similar article occurs in the treaty between Great Britain and Naples of the 12th July of the same year; (4) also in the treaty between Great Britain and Prussia of the 30th August of the same year; (5) and in that of the same date between Great Britain and Austria; (6) and in that between Great Britain and Portugal of the 26th September, also of 1793. (7) The plan of bringing in, for pre-emption by

(1) De Martens, Rec. V. 192.

(5) *Id.* 485.(2) *Id.* 440.(6) *Id.* 488.(3) *Id.* 477.(7) *Id.* 520.(4) *Id.* 482.

the government, cargoes of grain loaded in neutral ships and destined for an enemy's port, was adopted by the French Convention in their decree of the 9th May, 1793, by which they ordained that such cargoes should be taken for the service of the French government, and paid for at the price they would have obtained at their port of destination, freight and a just indemnity for detention being also given to the ship. (1) Our own instructions to our cruizers on this subject bear date the 8th June, 1793, and order that all ships laden in part, or wholly, with grain shall be detained, in order that such cargoes may be purchased for the account of government, freight being allowed to the ship;—or such cargoes might be released, on the master giving security that they should be carried into some port friendly to the British government. (2)

Correspondence with Denmark on this subject.

It has been above shown that a system of forbidding grain to be exported to France had been agreed to by all the principal powers of Europe, excepting Sweden and Denmark. But by our treaty already cited, of 1661, with Sweden, still in force, Provisions were liable to *confiscation* as contraband, and therefore it was not from this power that any objection could be made to the milder measure of *pre-emption*. Denmark alone, not being at war with either France or England, was reaping the profits of a neutrality of which she had nearly a monopoly; and, as might have been expected, her acquiescence was not easily obtained to a system which interfered so materially with the profits of her merchants. On the above-mentioned instructions of the 8th June, 1793, being presented to the Danish Court by our ambassador, Lord Hailes, a long correspondence ensued, which the diplomatic student will do well to peruse, principally from the letters of Count Bernstorff, then at the head of the Danish government, a man who well deserved

(1) De Martens, Rec. V. 382.

(2) Causes Célèbres, II. 335.

the character of statesman, as distinct from that of a mere minister, and whose letters on this occasion are models of diplomatic style, clear and forcible in language, and in point of argument, full of manly, serried reasoning. (1)

It will be remembered by the reader, that by our treaty of 1780, with Denmark, Provisions are expressly excepted from the list of contraband, so that our order of 8th June, 1793, was an infraction of a definite treaty. In presenting a copy of this order to the Danish Court, Lord Hailes accordingly remarked, that the present war with France was entirely different in character from those to which the law and custom of Europe were intended to apply; that there was no government existing in France which was acknowledged, not only by the belligerent, but even by the neutral, powers of Europe: that, there being thus no government in France, there was no method of obtaining security that the neutrality of Denmark would be observed by France; that in point of fact, this neutrality was constantly violated; that therefore, Denmark was not in a position to claim from England the observance of a neutrality which was broken through by the opposed belligerent. Lord Hailes then proceeded to remark, that the trade in corn with France existed at the present moment under an entirely novel aspect; that it was notorious that the French corn-trade was no longer a commerce between the merchants of one country and those of another, but that almost the entire trade was in the hands of the Executive Council, and the different municipalities; that the trade could therefore no longer be looked upon as one of the ordinary speculations of commerce, but must be regarded as a direct operation of a hostile government. The next position insisted on

(1) The correspondence is to be found, in French, in Charles de Martens' *Causes Célèbres*, II. 337

—360, and in German, in De Martens, *Rec. V.* 569—593.

was, that it was notorious that one of the, apparently, most efficacious methods of reducing the enemy to desire peace, was by preventing them from remedying, by importation, the existing famine which naturally resulted from the French government having arrayed in arms against the tranquillity of Europe the great mass of the labouring population of their country: that it was a maxim recognised by all who had written on public law that similar importations might be lawfully prevented, when it was hoped to reduce an enemy by this expedient: that our claims in the present case were of unusual strength, as the distress of the enemy was occasioned by the express means which he had employed to injure us; and that it was incontestable that the question now under consideration, was of a species entirely new, and could not be judged by the principles or rules established for wars carried on according to the usual customs of Europe.

This note, of which the remainder referred to questions not now under our notice, was followed, a few days after its delivery to the Danish government, by a note from the Prussian ambassador, who had received instructions to support its tenor in the name of his court. Count Bernstorff, in reply, returned a note in which, with much firmness, he insisted on the bilateral nature of the treaties between Denmark and Great Britain, and expressed his surprise at the issue of instructions directly at variance with our treaties with Denmark, without any previous demand of liberty to be absolved from the contract; that Denmark could not regard the question in any other light than as a manifest violation of treaties, the most sacred law which could exist among men, and that she must demand, with earnestness, the recalling of the obnoxious instructions, and that our government should issue none that should be at variance with our evident obligations. To this note was appended a Memorial, of which Lord Lansdowne justly remarked, that "the reply

of Count Bernstorff to our remonstrance, was one of the boldest, wisest, and most honourable replies he had ever read. It was a State-paper that should be kept for the model of every cabinet in Europe." This fine State-paper commences by remarking, that the Law of Nations is unalterable, and that its principles do not depend upon circumstances; it then points out, that if one of the contracting parties in a treaty had power to suspend or limit its operations, there was an end of all faith, and that treaties would cease to be made, because they would have become useless. The positions of our ambassador's note are then considered in detail: it is remarked that Denmark did not pretend to justify, nor had she even recognised, the actual government of France; but that the nation still existed; that commerce continued between the two countries; that treaties were still acknowledged, (1) and appealed to; that although no ambassador was sent from Denmark to France, yet that consuls were admitted, and commerce was protected: that the tribunals of France certainly were sometimes very hard upon merchants, but that none suffered more from this than the subjects of neutral powers; and that according to our new plan, we should be justifying the very wrongs we complained of, by imitating them; that the peculiarity which we endeavoured to attach to the present case could not affect the rights of neutrals, otherwise every

(1) With regard to the infraction of treaties in the present instance, it is to be remarked, that the French decree for bringing in cargoes of grain for pre-emption was dated 9th May, 1793, although the French treaty of 1749 with Denmark, still in force, excepted

grain from the list of contraband. *Yet this was done more than two months before Count Bernstorff's assertion.* It will be remarked, that we did not attempt to free ourselves from our obligation, till our opposed belligerent had previously done so.*

[* The conduct of the French government in this matter must, however, be looked at in the light of the treaties which England was, from the 25th March, 1793, concluding with neutral States on all sides for the non-exportation of provisions. See p. 365.—ED.]

individual and momentary interest might be alleged as a reason for breaking through permanent treaties: that the objection raised on account of the trade being carried on by the French government, and not by individuals, was entirely new and unheard of: and that finally, we, who now insisted on the right of reducing an enemy by famine, had formerly ourselves denied this right to Frederic IV. of Denmark, during a war with Sweden.

Declaration of
Russia with
regard to trade
with France.

Such is a brief sketch of a correspondence which is so directly to the point under consideration, that it could not be overlooked, though, from the necessary limits of the abstract, much of the interest which attaches to the original documents is lost. In the following month, August, 1793, the Russian ambassador gave notice that his government was on the point of sending a fleet of twenty-five sail to put a stop to all commerce to and from the ports of France; and he added, that his court felt too strongly the greatness of the present conjuncture, to think of balancing between a sacrifice for the common cause, and the profits of a trade in provisions and naval stores. Count Bernstorff replied in an eloquent and energetic remonstrance against this new restriction on the navigation of Denmark. The system, however, still continued to be enforced; and the next year, 1794, Sweden and Denmark united in a treaty for the mutual defence of their commerce, and a junction of their fleets took place in consequence,—but their influence was too inconsiderable to produce any change in the measures dictated by the inflamed passions existing on both sides at that period.

British instructions
regarding
ships laden
with provi-
sions.

At a later period of the year in which the instructions above discussed were issued, there appeared a British order, dated the 6th November, 1793, commanding that “all ships laden with goods the produce

of any colony belonging to France, or carrying *provisions* or other supplies for the use of any such colony," should be brought in for adjudication. (1) The United States took great offence at this order, which interfered with a lucrative part of their traffic; and an embargo of thirty days was in consequence laid on British shipping, and more violent measures were proposed. (2) The British government, however, saw reason for altering these instructions, which were certainly an innovation upon established custom, and a new set of instructions was accordingly issued on the 8th January, 1794, in which the obnoxious clauses were rescinded. Other clauses were substituted, forbidding neutrals to carry on the *direct* trade between the colony and the mother country,—the latter instructions being perfectly regular, and in accordance with what is called the Rule of 1756, which has been already discussed.

The practice of our Court of Admiralty, on the question of considering provisions as contraband, has been in accordance with the spirit of the above statements, namely, that "generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it." (3) Formerly a more severe rule was applied;—in 1673 Sir R. Wiseman, then King's Advocate, upon a formal reference made to him, asserted that corn, wine, and oil were to be deemed contraband. Sir W. Scott, however, speaks of the period when this opinion was given as a time "when many unwarrantable rules were laid down by

Practices of our Court of Admiralty regarding provisions.

(1) For copies of these additional instructions, see Rob. Rep. vol. I. App. I. and II.

(2) *Vide* Bancroft's Life of Washington.

(3) Sir W. Scott's judgment on the *Jonge Marguretha*, Rob. Rep. I. 193, [and a note to the report of this case in Tudor's Leading Cases.—ED.]

public authority respecting contraband.”(1) In the consideration of the circumstances of such cargoes brought in for adjudication, the same rules are applied as have been before noticed under the head of naval stores, namely, the state of preparation, whether or not the growth of the country from which they were last exported, and whether their port of destination shews that they were going to be employed in naval or military purposes, or merely for the ordinary purposes of life, or even for the service of merchant vessels.(2) The uncertainty of the question has also, in this case, made the measure of pre-emption, which we shall consider in the next chapter, a substitute preferable to the more rigorous measure of confiscation.(3)

The foregoing remarks shew how various have been the limitations of contraband.

From the foregoing observations on the different articles of contraband, the reader must have remarked how very various have been the Customary and Conventional Law of Europe in this regard. On no article, beyond the most obviously warlike instruments, is there anything like an identity of practice. The same nations have at different times observed quite different rules, and nothing is more common than to find the same State bound by treaties to observe distinctly opposite rules, at the same time, with different governments. In neither of the Armed Neutralities was there any attempt to establish a general rule for Europe on the subject of contraband, notwithstanding the eagerness of the contracting parties to engage in a new scheme of maritime legislation. In the Armed Neutrality of 1780, it was expressly stipulated that, in the matter of contraband, each State should keep to its existing

(1) Rob. Rep. I. 192. Chancellor Kent says the American courts have coincided with our own in regarding provisions as

contraband. *Commentaries on American Law*, I. 141.

(2) Rob. Rep. I. 193.

(3) *Id.* II. 182.

engagements with other States,—a duty which some of them did not think it necessary to observe in other parts of their convention. The consequence was that there was no general rule observed on the subject of contraband. Denmark and Russia, for instance, declared themselves each bound by their existing compacts; now by the Danish treaty with Great Britain, naval stores, canvas, cables, masts, &c., and also horses, were contraband, while by our treaty with Russia none of these articles were contraband. (1) Again, Sweden likewise bound herself to maintain her existing engagements; now by the Swedish treaty of 1661, money and provisions were contraband, while they were not so either with Denmark or with Russia. The Dutch, on their accession to the Armed Neutrality, in 1781, also maintained the principle of so far observing their treaties, appealing, with regard to this country, to their treaty of 1674, in which money, metals, provisions, and naval stores, are excepted from the list of contraband. (2) Portugal, on her accession to the system in 1782, observed the same rule of maintaining existing contracts. Prussia and Austria, in 1781, and Sardinia in 1783, having no treaties extant on the subject, declared that they would take for their rule (3) the treaty between Russia and Great Britain of 1766, justly thinking that, as they were helping themselves, they might as well choose, what the treaty just mentioned really is, the most limited compact on the subject of contraband that existed. In the second Armed Neutrality, in 1800, Russia, Sweden, and Denmark, in their respective treaties, observed the same rule, declaring that they should not deviate from their existing treaties on the subject of contraband. (4)

(1) Compare our Danish treaty of 1670, above cited, with our Russian treaty of 1766, De Martens, Rec. I. 395.

(2) Chalmers' Coll. I. 178, 179.

(3) De Martens, Rec. III. 246, 258, 269.

(4) *Id.* VII. 175, 184, 191.

Desirable that
contraband
should be de-
fined by treaty.

The unsettled state of the question, and the animosities likely to arise from contested rights, make it very desirable that governments should settle by definite treaty, what articles, and what articles solely, shall be deemed contraband. Our own obligations on this subject are, or have been, as follows:—

Our own en-
gagements
with Denmark.

With Denmark, by art. XIII. of the treaty of Kiel, in 1814, all treaties of peace and commerce are renewed in their full extent, as far as they do not contradict the present treaty. (1) We are therefore bound, with respect to Denmark, by the treaty of 1780, which declares that, besides the direct implements of war, and also saltpetre and horses, ship-timber, tar and pitch, sheet-copper, sails, canvas and cordage, and generally all that serves for the equipment of a vessel shall be deemed contraband, excepting unwrought iron, and deal planks. It is then added, that it is expressly declared that among articles of contraband, shall not be comprehended fish, or meat, whether salt or fresh, wheat, flour, corn, or other grain, vegetables, oil, wine, and generally whatever serves to the nourishment and support of life, all these articles being free to be transported to ports belonging to the enemies of either party, as long as they are not besieged or blockaded. (2)

With Sweden.

With regard to Sweden, by art. II. of the treaty of Orebro, in 1812, the relations of amity and commerce between the two countries are restored on the same footing on which they existed on 1st January, 1791, all treaties and conventions subsisting at that period being renewed and confirmed by the present instrument. (3)

(1) De Martens, Supp. V. 680.

(2) *Id.* Rec. III. 177. In the treaty between Denmark and Prussia of 1818, naval materials are not included in the list

of contraband; that term being restricted to warlike implements, going to a hostile port, *id.* Supp. VIII. 584.

(3) *Id.* Supp. V. 432.

In regard to this power, we are therefore still bound by art. XI. of our treaty of 1661, (1) which was declared still to be binding by the note of the British government regarding neutral vessels in 1780, (2) and which was also acknowledged as still in force by both governments in the explanatory treaty of 1803. (3) By the treaty of 1661, besides the usual munitions of war, horses and saltpetre, money and provisions, and also ships of war and guard ships, are expressly declared contraband. By our treaty of 1803, just mentioned, provisions, as well as naval materials, &c., are declared merely subject to pre-emption by art. II., but the treaty of Orebro carrying back the rule to the treaties existing in 1791, the more rigorous system is now our law, and provisions, as well as money, are by our treaties with Sweden liable to confiscation as contraband. (4)

By our treaty of 1812 with Russia, signed at Orebro, With Russia. there is no express reference to former treaties, but it is merely declared by art. II. that "the relations of amity and commerce between the two countries, shall be re-established on each side on the footing of the most favoured nations." (5)

Our treaty made with Portugal in 1810, was of With Portugal. most extensive compass on the question of contraband. By art. XXVIII., not only were munitions of war, saltpetre, and horses, recapitulated as articles of contraband,

(1) Dumont, Corps Dip. VI. II. 385, and Chalmers, I. 52.

(2) De Martens, Rec. III. 188.

(3) *Id.* Supp. III. 525.

(4) A different law exists between Sweden and the United States. By treaty of 1827 (De Martens, Supp. XI. i. 279), the articles of their treaty of 1783 are declared to be still in force be-

tween the parties on this subject. By arts. IX. and X. of this treaty, munitions of war, saltpetre, sulphur, and horses, are declared contraband; but money, metals, and provisions, are expressly declared not contraband. See De Martens, Rec. III. 569.

(5) *Id.* Supp. VII. 226.

but it was added that also all other articles which might have been designated as objects of contraband in all treaties previously concluded by Great Britain, or by Portugal, with other States, should be reputed contraband between the contracting powers. It was, however, added that articles which have not been fabricated into instruments of war, or which cannot be used for this purpose, still less articles which have been manufactured for other purposes, should not be deemed articles of contraband. (1) By this treaty, therefore, money and provisions, which had been declared contraband between this country and Sweden, and naval materials, which had been declared contraband by our treaty with Denmark, were to be deemed contraband between Great Britain and Portugal. This treaty, however, expired in April, 1835, pursuant to notice.

[A fresh treaty was made with Portugal on July 3rd, 1842, to be in force for ten years, and for twelve months subsequent to notice of its termination being given after that time. It deals with a vast variety of subjects, but does not renew the provisions of the former treaty relative to contraband. The only allusion to the subject is in the following clause, tit. XI.:—"The reciprocal liberty of commerce and navigation declared and stipulated for by the present treaty shall not extend to contraband of war or to articles the property of the enemies of either party." This treaty is still in force.]

With Brazil.

With Brazil, by our treaty of 1827, besides the usual munitions of war, and saltpetre, "timber for ship-building, tar and resin, copper in sheets, sails, hemp and cordage, and, generally, whatsoever may serve directly to the equipment of vessels of war, unwrought

(1) De Martens, Supp. VII. 211.

iron and fir planks excepted," are declared contraband. In this treaty, horses are not included in the list of contraband, though horse-furniture, holsters, &c., are specified as contraband. (1)

I believe that we have no definite treaties on the subject of contraband, either with France, Spain, Holland, or the United States. Our previous treaties were dissolved by the wars with these States, and the treaties restoring peace do not contain, either articles defining contraband, or articles re-establishing our former obligations on this question. Neither am I aware of any treaties on this subject existing between Great Britain and either Prussia or Austria.*

No treaties with France, Spain, Holland, the United States, Prussia, nor Austria.

The confiscation by the captor of articles of contraband, is a point too well established to need much illustration. An exception, I believe unique, is made by a curious article in the treaties between Prussia and the United States. By art. XII. of the treaty of 1828, between these powers, the thirteenth article of the treaties of 1785 and 1799, is declared to be still in

Articles of contraband confiscated by the captor.

(1) De Martens, Supp. XI. II. 486.

[* It is worth noticing that by the 16 & 17 Vict. c. 107, the executive government in England is invested with special powers for the prevention of the exportation or carriage coastwise of contraband articles, and the list of articles enumerated is instructive as affording indirectly a sort of legislative interpretation of, or comment upon, the term *contraband*. The language of the act is as follows:—"The following goods may, by proclamation or order in council, be prohibited either to be exported or carried coastwise: arms, ammunition and gunpowder, military and naval stores, and any articles which Her Majesty shall judge capable of being converted into or made useful in increasing the quantity of military or naval stores, provisions, or any sort of victual which may be used as food by man; and if any goods so prohibited shall be exported from the United Kingdom or carried coastwise, or be water-borne to be so exported or carried, they shall be forfeited."—ED.]

force. By this article, none of the usual military stores are to be deemed contraband, "so as to induce confiscation or condemnation, and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in a case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage." Then follows, in the treaty of 1799, the list, which has already been quoted, of articles of contraband. The government of the United States was desirous of introducing a similar stipulation in the treaty with England at the close of the American War of Independence, proposing, says Jefferson, to exempt "from capture by the public or private armed ships of either belligerent, when at war, all merchant vessels and their cargoes employed merely in carrying on the commerce between nations; it was refused by England." (1) It is curious that the treaty with Prussia, which forms an exception to all modern treaties, which is in contradiction to the law of Europe, as laid down by the best authorities, and which even the Americans themselves do not think of regarding as

(1) See Jefferson's Correspondence, I. 53. For the treaty of 1828, see De Martens, Supp. XI.

II. 619. For the treaty of 1799, *id.* Rec. VI. 678. For that of 1785, *id.* IV. 42.

otherwise than an exception, though in their opinion a wise exception, to the law as usually recognised, is regarded by M. Klüber as the established law in the international code of Europe. Lest I should be supposed to have misunderstood his meaning, I quote his own words at length. "Les principes suivans déterminent les droits des belligérans, relativement au commerce des neutres et à la contrebande de guerre. 1°. Il doit d'abord être présumé que les neutres ne font point le commerce de la contrebande; donc, et les états neutres étant d'ailleurs indépendans, les belligérans ne peuvent, à défaut de convention particulière, s'arroger le droit de visiter leurs convois de marchandises, soit sur terre, soit sur mer, suffit qu'il soit prouvé que les marchandises leur appartiennent. 2°. Toutes les marchandises qui ne sont point de contrebande peuvent être librement amenées par des neutres, si ce n'est aux places assiégées, bloquées ou investies. L'ennemi ne peut s'en emparer que lorsqu'il en a fortement besoin pour sa propre existence, et toujours en payant leur entière valeur. 3°. Si néanmoins un état neutre ou ses sujets auraient amené de la contrebande, et qu'elle tombât entre les mains de l'ennemi, *ce dernier ne pourrait encore, sans raison particulière, se l'approprier qu'en la payant*; ou bien il pourrait la renvoyer sur caution qu'elle ne rentre plus, et que tout commerce pareil cesse dorénavant. *La confiscation de la contrebande de guerre*, et encore moins celle des autres marchandises qui se trouvent dans le même convoi ou des moyens de transport, comme bâtimens, chariots, chevaux, etc., *ne peut donc être justifiée en principe.*" (1) In the next section, M. Klüber admits that most of the treaties now in existence permit the confiscation of contraband, but, for his extraordinary assertion that such confiscation cannot be justified on

(1) Klüber, Droit des Gens Moderne de l'Europe, vol. II. § 289, ed. 1831, p. 96.

principle, he gives no reason; he arrives at it by no process of argument; he merely states in a note, that this principle is recognised by the American treaty of 1785. M. Klüber does not notice that *all* the great authorities on this subject are against him; he does not attempt to controvert their reasoning; he merely favours us with his unsupported assertion; and contents himself with contradicting what the opinions of all authorities, and the practice of Europe, interrupted only by one single exception, have declared to be the Law of Nations on this question. As I cannot explain this curious, but not singular case, in the work of M. Klüber, I pass on to the opinions of other writers on the subject. With regard to things carried to an enemy, having solely a military use, as arms, Grotius says, that he is to be regarded as an enemy who carries to an enemy the necessaries of war. With regard to articles of doubtful service (*ancipitis usus*), as money, provisions, ships and naval materials, he says, that a difference is made by circumstances: "if I cannot defend myself without intercepting them, my necessity confers the right of doing so, but with the obligation of making restitution, unless other circumstances intervene: but if the person who carried the goods knew that he was interfering with my right, as in relieving a place besieged, or ports blockaded, his goods may justly be confiscated." Bynkershoek also says, that contraband goods are to be confiscated: "quicquid non licet [amicis ad hostes nostros advehere] si amicus deprehendat, optimo jure publicatur, et eo solo absolvitur poena mittentis amici." Vattel adds his authority to the same opinion: and, finally, De Martens states the same rule as the established Law of Europe. (1)

(1) See Grotius, de Jure, lib. III. c. v. § 1, 2, 3. Bynkershoek, ch. vii. § 118. De Martens, Quæst. Jur. Pub. lib. I. c. x. Vattel, Droit des Gens, liv. III. Précis, liv. III. ch. vii. § 319.

Freight is not allowed to the ship carrying articles of contraband, which are seized by a belligerent. This rule is distinctly laid down by Bynkershoek, in the chapter just quoted, and it is also the rule as recognised in our Court of Admiralty. In fact, the carrying articles of contraband to a belligerent is reckoned as a wrong to the other belligerent, who punishes the parties, both owner and carrier, by seizing upon their property concerned in the offence. (1) A curious regulation occurs in the Russian ordinance for privateers, of 1787, which declares, art. XII., that if the captain of a neutral shall of his own accord give information that he has articles of contraband on board, he shall receive, from the persons who take possession, double the amount of freight which he was to have received from the enemy. (2) This regulation does not interfere with the rule above laid down, but rather strengthens it, the reward to the captain for betraying his trust being mentioned as a gratuitous premium, and confirming the rule by the fact of its being mentioned as a deviation.

Freight not allowed on captured contraband goods.

Greater difficulty is involved in the question whether the having contraband articles on board affects the ship and the other articles of the same cargo. By the ancient law of Europe the carrying contraband made the ship liable to confiscation, (3) but this rule has been relaxed in modern practice. By our treaty with France at Utrecht, in 1713, it is expressly stated, art. XXVI., after mentioning that contraband goods are to be confiscated, "saving always, as well the ship itself, as the other goods found therein, which by this treaty are to be esteemed free; neither may they be detained on pretence of their

Effect of contraband on the ship and goods that accompany it.

(1) Rob. Rep. I. 242 and 288.

(2) De Martens, Rec. IV. 341.

(3) Sir W. Scott on Ringende Jacob, Rob. Rep. I. 90. See also declaration of England and Hol-

land against Spain, 17 Sept. 1625, art. xx., and treaty between England and France, Nov. 3, 1663, art. xv., quoted in Rob. Rep. I. 288, note.

being, as it were, infected by the prohibited goods, much less shall they be confiscated as lawful prize." (1) The same clause is inserted in art. XIII. of the treaty of 6th February, 1778, between France and the United States. (2) But in the ordinance of the King of France, dated 26th July of the same year, 1778, it is expressly stated, in art. I., that after the articles of contraband have been taken out, and confiscated, the ship and remainder of the cargo are free, "unless the said articles of contraband compose three quarters of the value of the cargo; in which case the ship and the cargo shall be confiscated altogether." (3) It is a frequent clause in treaties of commerce that all the cargo, except the articles of contraband, shall be free to continue their voyage, and I believe that the rule laid down in the above French ordonnance, of 1778, is more severe than the present practice of Europe would admit. Our own courts do not observe any such practice of condemnation; the only extension of the penalties of contraband, with us, being to the part of the same cargo, or to the share of the ship, which may belong to the owner of the contraband. This is not any recent innovation, but is a rule of some antiquity. Bynkershoek gives a chapter to this subject, in which he says that both the remainder of the cargo, and also the vessel, may in some cases be confiscated. With regard to the cargo, he says it is just to distinguish whether or not the remainder of the cargo belongs to the same owner as the contraband; if it does, it is confiscated, "*ob continentiam delicti*;" but if not, the property of the innocent is not affected by the conduct of the guilty. With regard to the ship, he says that the question depends upon the knowledge of the captain, or owners, of the illegality of the transaction. If the captain be also owner of the ship, and knows that he is taking contraband goods on board, his vessel may justly be confiscated; and if the

(1) Chalmers, I. 406.

(3) *Id.* III. 19.

(2) De Martens, Rec. II. 593.

owners of the vessel consent to take unlawful goods on board, knowing their character, their vessel may be confiscated; but the owners of the vessel are not to suffer if ignorant of the illegality of their cargo.(1) At the same time that Bynkershoek lays down this rule, he admits that a considerable number of treaties, which he cites, are at variance with the decision, but he adds, in his favourite phrase, that "*Juris Gentium magistra, Ratio*," points to the conclusion which he has stated to be the law. Since the time of Bynkershoek, a considerable number of treaties, to some of which our own country has been a party, have declared that none but the contraband goods are to be taken from the vessel, and that the ship and remainder of the cargo are to be allowed to proceed. Sir Wm. Scott has, however, distinctly stated the law, as understood in our prize courts, to include in the sentence of condemnation all that part of the cargo which belongs to the owner of the contraband, and also the ship, or any share of the ship, if belonging to the owner of the contraband: and the reason is given that "where a man is concerned in an illegal transaction, the whole of his property involved in that transaction is liable to confiscation."(2) With such high authorities as Bynkershoek

(1) Bynk. Quæst. Jur. Pub. lib. I. cap. XII.

(2) Sir Wm. Scott on the *Jonge Tobias*, Rob. Rep. I. 330. See also the *Ringende Jacob*, *id.* 91; *Sarah Christina*, *id.* 242, and the *Stadth Embden*, *id.* 80. Of course Sir W. Scott's rule only applies to those cases where the reverse is not declared by treaty. Albericus Gentilis says that the question of the infection of contraband was debated in his days, but was not determined, nor does he give an opinion on the subject. *Hispan. Advoc.* I. c. XX. Zouch says that the distinction was made

by some in his time of confiscating such part of the property as belonged to the owner of the contraband: but he does not give his opinion on the subject, merely saying "*alii distinguunt*." *Juris et Judicii Fœdalis Explicatio*, P. II. c. VIII. § 18. Heineccius says, that in 1648 the Dutch proclaimed that they would confiscate not only contraband goods, but also the ship that carried them, and in 1659 declared that such was the usual custom; but he says that the ship ought not to be confiscated, if only the captain, and not the owner of the innocent

and Sir Wm. Scott, it must be concluded that such penalty from infection is the rule, and that the treaties which differ from it are exceptions; but it appears very desirable that this point should be settled by definite treaty,—the only method of avoiding those heartburnings and animosities, which must arise from the confiscation of neutral property on any grounds but those of certainty, or of very strong presumption.*

goods, has offended. *De Navibus ob Vecturam vetitarum Mercium Commissis*, c. II. § 3, 4. Hübner says that a ship carrying arms to a belligerent may be confiscated, together with her cargo, if this cargo belongs to the pro-

prietors either of the ship or of the contraband. *De la Saisie des Bâtimens neutres*, vol. II. ch. IV. § 4. Thus the authority of previous writers is on the side of the practice of our courts.

[* The subject of Contraband of War has been treated with great fulness or diffuseness by all the recent writers, especially by Ortolan, Hautefeuille, Halleck, and Phillimore. The letter of Sir W. Harcourt (*Historicus*) on "Neutral Trade in Contraband of War," chiefly in reply to Hautefeuille's doctrine (tom. II. tit. VIII. s. III.), that it is a breach of national neutrality for the citizens of a neutral State to trade on their own soil with a belligerent in contraband of war, is an able exposition of the nature of contraband as implying a restriction of transport and not on trade as such, and as affecting the individual carriers or merchants and not their governments. Sir W. Harcourt cites the Queen's Proclamation of Neutrality, issued on May 14th, 1861, at the time of the Southern Insurrection in the United States, by which she warns her subjects against "carrying officers, soldiers, despatches, arms, military stores or materials, or any articles considered and deemed to be contraband of war, according to the law or modern usage of nations."

In his first edition (1857), Sir R. Phillimore intimated a strong opinion adverse to the right of sale at

[h]ome by a neutral to a belligerent of contraband goods, though he based his conclusion on nothing stronger than what he held to be a legitimate conclusion from premises previously laid down by himself, and though he admits the decisive judgment of Bynkershoek and Mr. Justice Story to be entirely the other way. It is interesting to notice that the scorching criticism of *Historicus* ("Letters," p. 130) has not been unproductive of effect on Sir R. Phillimore's mind. In the last edition (1873), Sir R. Phillimore, while preserving the matter in the former edition entire, inserts a new section, CXXLII., some of the paragraphs of which are in the following language:—

"At the same time, it is perfectly clear that at present this theory has not been justified by the practice of States. The tradesman, it is said, is not bound to inquire who is his customer, and the interference with commerce, which the enforcement of such a theory must lead to, would, it is alleged, be intolerable to the Neutral State, and impossible to be executed by her government. . . . However difficult it may be to draw a logical line between the responsibility of the State as to the departure of privateering vessels, and as to large consignments of arms on board a number of vessels leaving the neutral ports, perhaps simultaneously, such a line is at present drawn by usage and practice. The law was once tersely expressed by an English Foreign Secretary of State, to a belligerent State complaining that from the shores of neutral England ships laden with munitions of war sailed to his enemy: 'Catch them if you can,' was the answer of Lord Palmerston." Vol. III. (Ed. 1873), p. 410.

Sir R. Phillimore, in his treatment of the whole subject, hardly distinguishes with sufficient clearness between acts done by private citizens for which the government may or may not be responsible according

[to the rule of the Law of Nations applicable to the case, and acts done directly by the government itself for which it is always and obviously responsible. To the latter class of acts belong the loan of troops, concession of rights of passage, permission to refit ships of war in the national harbours, and the like. To the former belong all acts done in the ordinary cause of trade, even though the trade extends to new materials required for the purposes of the war, and though it increases greatly in extent. The difficulty arises as to the intermediate cases, such as those of foreign enlistment conducted by private agents, and the sale by private persons of properly fitted-out ships of war. It would seem that it is the ostentatiousness and magnitude of, and the comparative facility of preventing, these latter classes of enterprise, which have led to the acts in which they consist being imputed rather to the government than to the private persons who are the real doers of them.

It is to be noticed, that in Sir A. Cockburn's *Reasons for dissenting from the award of the Tribunal of Arbitration at Geneva* (p. 26), he draws the line between permissible and not permissible acts at the point at which ships equipped and armed are not sent out to be taken to the port of the belligerent purchaser, but are sent to sea with officers and a fighting crew for the purpose of immediate warfare. "Under such (the latter) circumstances," he says, "the transaction ceases to be one of mere commerce, and assumes the form of a hostile expedition sent forth from the territory of the neutral." It is perhaps sufficient comment upon this arbitrary (even if possible) mode of drawing the line, to notice that the British Foreign Enlistment Act of 1870 wholly disowns it, and enables the government to follow up every act in pursuance of a contract of sale, actual or presumed, the execution of which contract may lead to a ship built in British territory being employed in the

[service of a foreign State at war with a friendly State (see p. 238).

It may also be observed, that some confusion arises from using the term *contraband* to cover all articles of which the carriage or sale on the part of a State or of private persons is for any reason forbidden by the Law of Nations, as well as where the carriage only involves confiscation at the hand of a belligerent captor. The original and true use of the term would limit it to the latter meaning only.

One point that has been much disputed of late is, as to whether, with respect to things which, like provisions, money, metallic ore, timber, leather, are only in exceptional circumstances (saving the cases of blockades, and of directly supporting an army in the field), materially needed to carry on the war, a belligerent can (in the absence of a special treaty), at any moment in the course of the war, impress upon them the character of contraband so as to make them liable to confiscation. England has been a good deal accused of claiming such a right of creating what is called "occasional," "accidental," or "facultative" contraband. Hautefeuille and Ortolan, as might be expected, are in favour of absolutely limiting the definition of contraband to articles which (according to the former) are in their nature of first necessity for war, or (according to the latter) have their chief usefulness in war. Heffter (§ 160) also takes the same view, but, while he resents the classification of the articles above mentioned as contraband, he allows belligerents the right to seize them when their hostile use and destination is beyond all doubt. Halleck (ch. xxiv.) recognises that the uniform practice of the British Admiralty is to test the character of provisions and such things by their "special destination and intended use;" but by the established doctrine of the British Admiralty "it is not in all cases

[“ necessary, in order to make provisions contraband, “ that the destination to the use of the enemy’s military “ or naval forces should be certain.” Woolsey (§ 180) holds that the “ doctrine of ‘ occasional’ contraband, “ or contraband according to circumstances, is not “ sufficiently established to be regarded as a part of “ the Law of Nations.” “ The most that can be said is, “ that belligerents have sometimes put doubtful articles “ into the list of contraband, and neutrals have some- “ times submitted to it, but that no clear practice seems “ to have prevailed.”

The prevalent opinion seems now to be, that belligerents have a clear right to include “ coal ” in the list of contraband. Ortolan (Liv. III. ch. VI.), who, in an earlier edition of his work, expressed himself as adverse to the admission of coal as being of universal necessity, now, in his fourth edition (1864), quotes approvingly from Pratt’s “ *Contraband of War* : ” “ In the present “ application of steam to purposes of war, the article “ (coal) would without doubt, if destined to a port of “ naval equipment, be considered as falling under the “ description of contraband.” Mr. Dana, in his elaborate note to Wheaton on the subject (part IV. ch. III.), notices that in the Crimean war, the English stopped coals on their way to a Russian port; but in the debate in the House of Commons, the ministry said that coals were to be regarded as *ancipitis usus*. By the Queen’s Proclamation of Neutrality (13th May, 1859) in the war between France, Sardinia, and Austria, the usual warning was given against carrying contraband. On some British merchants inquiring at the Foreign Office whether coal was contraband, the government declined to decide, but added: “ It appears, however, to Her “ Majesty’s Government, that, having regard to the “ present state of naval armaments, coal may, in many “ cases, be rightly held to be contraband of war.” (*Jurist*, 1859, vol. v. part II. p. 203.) In this very

[war, however, France and Sardinia declared coal not to be contraband of war. See Ortolan *in loc. cit.*

There is no doubt at the present day that all the parts of the machinery of steamships might, in special circumstances, be made contraband of war.

From a general review of the authorities, it appears that no doubt exists as to the right invariably claimed by belligerents, whenever they have stood in need of it, and pre-eminently by England, (the practice of whose courts cannot but rightly have great weight in fixing the law bearing solely on maritime warfare,) of including in the list of contraband all articles which, from the changing phases of the war, or from novel modes of conducting war, may become capable of rendering material support, on a scale not wholly insignificant, to the military or naval power of the enemy. It is recognised, however, as the duty of the belligerents so including unwonted articles in the list of contraband, first, to provide that its courts give due credit to the really innocent character and destination of supposed contraband, and, secondly, to advertise as widely as possible to neutrals the list of contraband and any changes made from time to time in that list.

It is to be noticed that, according to the doctrines laid down in the British High Court of Admiralty, "there must be a *delictum* existing at the moment of "seizing to sustain the penalty" (Lord Stowell in *The Trende Sostre*, 6 Rob. Adm. Rep. 390, note); and from the moment of quitting the neutral port with a destination to a belligerent port, the offence is complete (*The Imina*, 3 Rob. Adm. Rep. 168); the result is the same although the intended voyage be from one port of the enemy to another (*The Edward*, 4 Rob. Adm. Rep. 68, 70); and it is not permissible to carry articles of a contraband nature to a belligerent port with an intention of selling innocent commodities

[which form part of the cargo, and of proceeding with the contraband articles to a port of ulterior destination (*The Trende Sostre*, 6 Rob. Adm. Rep. 390, 392, note). Goods are not held contraband if innocently shipped on board a vessel which sailed in *bonâ fide* ignorance of the war, or if before capture of the ship the port for which she was bound had fallen into the possession of the power by which she was captured. Notwithstanding the general rule that the proceeds of contraband cannot be confiscated on the return voyage, nor can the offence be otherwise punished, yet an exception is made where the owner is proved to have committed perjury in order to conceal his contraband or to have had false papers. An exception has also been made when the port of destination is a distant settlement of a belligerent, in which case the outward and return voyage are treated as one expedition. (See Sir W. Scott's language in *The Nancy*, 3 Rob. Adm. Rep. 126. And with respect to all the above facts, rules and cases, see Notes to the *Jonge Margaretha*, in Tudor's *Leading Cases in Mercantile and Maritime Law*.)

In recent times a good deal of prominence has been given to what Heffter calls "analogous cases of contraband," that is, a class of things and persons which are liable to be treated in much the same way as contraband, but are not transported in the way of commerce. Such are despatches of certain kinds, sailors, soldiers and officers, civil and military agents, and the like. It is a well admitted principle that neutral States are entitled to keep up diplomatic correspondence with their representatives in the belligerent countries, and to forward to and fro diplomatic agents and papers between their own country and these countries. But the presumption is that no unneutral acts are concealed under cover of this correspondence and intercourse. This favourable presumption is removed if a correspondence is found to

[be conducted between a neutral government or its subjects and persons in the military and naval employment of one of the belligerents. "Search," of course, is allowed in order to ascertain the character of persons and papers in neutral vessels. It has become customary to make special treaties (as that of 1846-7 between Great Britain and the United States) for regulating the inspection of mail-bags, and in some cases (as in the American Civil War, 1862,) a belligerent government has issued instructions to exempt from search "public" mails of any neutral or friendly power, duly certified "or authenticated as such."

Especial attention was called to the law regulating the transport by neutrals of belligerent agents by the case of the *Trent*, which occurred in 1862, during the American Civil War, and which gave rise to a long and wholly unsatisfactory correspondence between the English and United States Governments. The Government of the Southern States despatched to England two political agents, Messrs. Slidell and Mason, who accordingly took their passage in the British steamer the *Trent*, which ran between Havana and Nassau, two neutral ports, and at Nassau transferred its mails and passengers to the next steamer on the route. Some hours before reaching Nassau, the *Trent* was stopped and searched by the United States' war-steamer, the *San Jacinto*, commanded by Captain Wilkes. In spite of the protestations of the commander of the *Trent*, Captain Wilkes took Messrs. Slidell and Mason and their suite out of the ship, and allowed her to proceed on her voyage. On an urgent remonstrance by the British Government, the United States subsequently surrendered their prisoners, and a long correspondence ensued.

With respect to this celebrated case, it may first be noticed that the question of contraband of war was wholly absent. Sir W. Harcourt forcibly exposed the

[weakness of the contrary supposition by his quotation from Lord Stowell's judgment in the *Imina* (3 Rob. Adm. Rep. 167): "This is a claim for a ship taken, as "it is admitted, at the time of capture sailing for "Embsden, a neutral port—a destination on which, if "considered as the real destination, no question of contraband could arise; *inasmuch as goods going to a "neutral port cannot come under the description of contraband, all goods going there being equally lawful.*" (See Letters of Historicus on the "Affair of the *Trent*.") It is not worth while to discuss the whole merits of the case again, as the controversy that arose upon it cannot be said to have ascertained or altered the law in the slightest. But it is necessary to notice the case, as it suggested the problems whether quasi-diplomatic persons can be or ought to be treated by a different rule from ordinary commercial goods; whether any variation can ever be admitted from the strict rule that the imperative duty of a captor is instantly to take a vessel suspected of unneutral conduct to a prize court for adjudication, and that only by such adjudication is the capture perfected and the title to the property, if it be a question of confiscation of property, changed; and what were the rights in respect of diplomatic intercourse enjoyed by belligerents in the exceptional position of the Southern Confederacy. (See Abdy's *Kent*, ch. ix.; Dana's note to *Wheaton*, part iv. ch. iii.; and the cases cited in *Tudor's Notes* already referred to.)—ED.]

CHAPTER VIII.

PRE-EMPTION.

THE subject of Pre-emption, or the right of a government to purchase for its own use the property of the subjects of another power, instead of allowing such property to reach its original destination, has been in part considered under the foregoing head of Contraband. It has, however, features of its own which require a separate notice.

Nature of
Pre-emption.

By the former custom of Europe, the use of the right of Pre-emption appears to have been in much more frequent operation than at present, and to have been exercised with a wider scope of purpose. Instead of being, as now, confined to those cases in which it is doubtful whether we may confiscate, and in which Pre-emption is employed as a mild exercise of our right to prevent assistance from being given to an enemy, formerly it appears that the right was exercised on in-different subjects, and that even in the most peaceable times governments were in possession of the power of having the first choice of any cargoes which entered their ports for sale. This right is frequently referred to in treaties; by some it is acknowledged, and its exercise is limited by certain stipulations; by others, especially the more recent, it is agreed that this right shall not be exercised at all, on the property of the subjects of either contracting party. In a treaty with Denmark in 1641, it was agreed that the King of Spain should have the right of first purchase of all goods in Danish vessels, but that if this right were not exercised

Formerly fre-
quently exer-
cised even
during peace.

within six days, then the cargo might be sold to any purchaser. (1) By a treaty between England and Portugal, in 1642, British goods are only to be taken by the King of Portugal on his paying a just price for them, such price to be paid two months afterwards, unless the seller agree to other terms. (2) By treaty between Denmark and the United Provinces, in 1645, it is agreed that no goods shall be taken from the ships of the latter unless by agreement with the owner, and duly paid for. (3) From this, and the preceding treaty, it would appear that the seizure of cargoes for Pre-emption was a practice more constant than was any promptitude in paying for them; that the exercise of the right was regular, but that the discharge of the obligation was irregular. It was probably in part the inconvenience sustained through such irregularity that occasioned the article in the treaty of Munster, between Spain and the United Provinces, (4) which is also found in a great number of succeeding treaties, that the goods and vessels of the contracting parties should not be seized upon any pretext. Still, after this period, some traces of the old custom are observable in a few treaties. The United Provinces, which, as we have just seen, stipulated with Spain in 1648 that no seizure at all should be allowed, agreed with England in 1654 that the ships and goods of either party should not be stopped except upon cogent necessity, and on paying a just satisfaction. (5) And England, in the same year, agreed with Portugal that no seizure should take place except with leave obtained from the other government, as well as from the owner of the ship. (6) It now, however, became a usual article in treaties to forbid such seizures, and an article to this effect is still found

(1) Dumont, Corps Dipl. VI. i.
210.

(2) *Id.* 239.

(3) *Id.* 318.

(4) *Id.* 481.

(5) *Id.* II. 76.

(6) *Id.* 88.

in most treaties of commerce; but a modern instance of the old system is found in art. xvii. of the treaty made between this country and Portugal in 1810, in which, after stipulating that all naval or military stores seized by the government of Portugal are to be paid for at the price fixed by the proprietors, who are not to be forced to make any abatement, it is added, that if the Portuguese government take possession of any cargo whatever, or of any part of a cargo, with the intention of purchasing it, or otherwise, they are to be liable for any damage which the goods may sustain while under the custody of the Portuguese officers. (1)

In this country, although some of the treaties above quoted shew that our government formerly recognised the right of Pre-emption in its most comprehensive scope, yet such exercise of the right has with us long fallen into disuse. Pre-emption is confined, in our practice, to those instances where goods are of that description that their transport to our enemy would be manifestly to our disadvantage, while, on the other hand, the law of Contraband does not justify their confiscation. "Pre-emption," said Sir Wm. Scott, is "no unfair compromise, as it should seem, between the belligerents' rights and the claims of the neutral to export his native commodities, though immediately subservient to the purposes of hostility." (2) In the previous chapter, on Contraband, we have seen in what manner this law is applied in doubtful cases,—in the examples of naval materials, and of provisions carried to an enemy.

Our own
practice re-
garding Pre-
emption.

The application of the right of Pre-emption, as defined by our courts, is recognised in several treaties. In our treaty with the United States of 19th November, 1794 (ratified in 1795), it was agreed, art. xviii., after

Treaties re-
garding Pre-
emption.

(1) De Martens, Supp. VII. 207. (2) Rob. Rep. I. 241.

mentioning that the usual munitions of war, and also naval materials, shall be confiscated as contraband, that "whereas the difficulty of agreeing on the precise cases in which alone provisions and other articles not generally contraband may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise: It is further agreed, that whenever any such articles so becoming contraband according to the existing Laws of Nations, shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified; and the captors, or in their default the government under whose authority they act, shall pay to the masters or owners of such vessel the full value of all articles, with a reasonable mercantile profit thereon together with the freight, and also the damage incident to such detention." (1) In our treaty with Sweden in 1803, after stating that munitions of war and money are to be confiscated as contraband, it is added, art. II., that on provisions and naval materials, going to an enemy's port, if the produce of the neutral country and going on the account of her subjects, may be exercised the right of Pre-emption by the belligerent government, under the condition of paying a profit of ten per cent. on the price of the merchandise, either as valued in England or in Sweden at the choice of the proprietor, besides an indemnity for the freight and the expenses of detention. (2)

Opinion of
Sir William
Scott.

These treaties are in accordance with the practice of our Court of Admiralty, in which a profit of ten per cent. on the cost price has been usually allowed to the proprietor. (3) "It is the principle of our court that

(1) De Martens, Rec. V. 674.

(2) *Id.* Supp. III. 526.

(3) Rob. Rep. II. 174. See in-

deed the whole judgment on the *Haabet*, from which the following quotation is made.

the expected payment at the port of original destination is not to be taken as the measure of compensation on the part of the belligerent." This is a point of admitted difficulty, but the following explanation given by Sir Wm. Scott will probably convey as much satisfaction as is possible in a case of such delicacy. "I have never understood that, on the side of the belligerent, this claim (of bringing in cargoes for Pre-emption) goes beyond the case of cargoes avowedly bound for enemies' ports, or suspected on just grounds to have a concealed destination of that kind; or that, on the side of the neutral, the same exact compensation is to be expected which he might have demanded from the enemy in his own port; the enemy may be distressed by famine, and may be driven by his necessities to pay a famine price for the commodity if it gets there; it does not follow, that acting upon my right of war in intercepting such supplies, I am under the obligation of paying the price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established that such a purchase shall be regulated exactly upon the same terms of profit which would have followed the adventure if no such exercise of war had intervened; it is a reasonable indemnification, and a fair profit on the commodity, that is due, reference being had to the original price actually paid by the exporter, and the expenses which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms, but certainly the capturing nation does not always take these cargoes on the same terms on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust

captors, for these are not unjust captures, but authorized exercises of the rights of war." (1) *

(1) Rob. Rep. II. 182, 183.

[* In the matter of Pre-emption, as in that of the general subject of Contraband, an attempt is made by some eminent foreign writers to substitute their aspirations for the recognised usage, and to impute to England the offence of arbitrarily maintaining a practice condemned by law. Thus Ortolan, vol. II. liv. III. c. VI., says, "that the pretended right of Pre-emption applied to provisions and to other merchandise not contraband of war has never formed a generally recognised rule. It follows it is only an arbitrary act, an assault on the liberty and independence of the neutral flag." Heffter again, § 161, says: "Pre-emption is no general rule of the Law of Nations," and that, if resorted to, the compensation paid should not only equal the market price of the things seized, but should cover the whole commercial interest which the neutral owner had in the venture. (See Hall's note, and the references there given, "*Rights and Duties of Neutrals*," p. 122.) The best comment upon the above criticisms is contained in the following extract from the British Act for Regulating Naval Prize of War, of 1864:—

"§ 38. Pre-emption.

"Where a ship of a foreign nation passing the seas laden with naval or victualling stores, intended to be carried to a port of any enemy of her Majesty, is taken and brought into a port of the United Kingdom, and the purchase for the service of her Majesty of the stores on board the ship appears to the Lords of the Admiralty expedient without the condemnation thereof in a prize court, in that case the Lords of the Admiralty may purchase, on the account or

[“ for the service of her Majesty, all or any of the stores
“ on board the ship; and the Commissioners of Cus-
“ toms may permit the stores purchased to be entered
“ and landed within the port.”

The English government has here publicly asserted its right to buy up other things than those which happen at the time to be included in the list of contraband.—ED.]

CHAPTER IX.

BLOCKADE.

Severity of
former prac-
tice with re-
gard to breach
of blockade.

THERE is no rule of the Law of Nations more distinctly laid down, than that which subjects to confiscation the property of a neutral which it is attempted to introduce into a place besieged or blockaded. It is a rule admitted by all writers on the subject; it is notorious to the subjects of all States; it is acknowledged by all governments; and it has never been questioned in the hardest schemes of innovation. An attempt to relieve a place invested, is in itself such a direct violation of a belligerent's rights, that punishment ensuing from such offence is clearly dictated by common reason. Indeed, some of the old writers on the Law of Nations declare that more severe penalties should be inflicted than are incurred according to the present Law of Europe, personal punishment being, according to the more ancient authorities, incurred by this offence. Grotius, after saying that interference in the case of a siege or blockade, justifies the confiscation of goods, adds, "that if my enemy's injustice towards me be evident, the neutral who aids him in his unjust war, will be guilty not only of a civil but of a criminal offence, and may be punished accordingly." (1) Bynkershoek says that, at the least, the goods intercepted may be confiscated, and that often punishment, if not capital, yet certainly personal, may be inflicted. (2) Vattel says, that a belligerent has a right to treat as an enemy any one who attempts to carry any thing to a place besieged or blockaded. (3) And even so recent

(1) De Jure, lib. III. cap. I. cap. XI.

§ v. 8.

(3) Droit des Gens, liv. III.

(2) Quæst. Jur. Pub. lib. I. ch. VII. § 117.

an authority as De Martens, says, that infraction of blockade justifies confiscation of ships and goods, and even the infliction of personal penalties and of death. (1) Grotius gives instances from ancient history, in which the punishment of death was inflicted; and in modern history I find a case mentioned by Philip de Comines, which bears upon the subject, though it is not exactly in point, as both parties were at war. When the Duke of Burgundy was besieging Nanci, in 1476, several of the Duke of Lorraine's officers attempted to throw themselves into the town: some succeeded, but some were made prisoners, among whom was one Cifron, whom the Duke of Burgundy ordered to be hanged, affirming that when a prince had invested a town and erected batteries before it, any who attempt to reinforce the garrison, "are to be looked upon as criminals, and suffer death by the law of arms." "This," says Philip de Comines, "was the custom of Italy and of Spain, but not of France, though the French code of war was more cruel in other respects." (2)

Such severe practices have long been discontinued, confiscation of the owner's goods engaged in the attempt being now the only punishment incurred by him by the breach of blockade. Even this penalty is, in our courts, inflicted with the most lenient construction consistent with justice; the confiscation of a vessel attempting a breach of blockade not necessarily involving a confiscation of her cargo. The captain of the vessel is certainly the agent of the owners of the vessel, and his offence clearly involves their property; but the captain is not the agent of the owners of the cargo, unless expressly so constituted; and his misconduct cannot implicate their property, provided their intentions were innocent. If the ship and cargo belong to the same person, then,

Modern practice more lenient.

(1) *Précis du Droit des Gens*, liv. VIII. ch. VII. § 314.

(2) *Memoirs*, transl. of 1828, I. 448.

as in the case of contraband, both are confiscated. And if any artifice can be proved, or if the owners of the cargo have delegated general powers to the captain, then they are penally affected by his misconduct. But the mere guilt of the captain does not involve the property of persons who were innocent themselves, and who had not constituted him their agent. (1)

Penal consequences, how incurred.

To affect a party penally with the consequences of a breach of blockade, "three things must be proved—1st, the existence of an actual blockade—2dly, the knowledge of the party—and, 3dly, some act or attempted act of violation, whether the violation be by going in, or by coming out with a cargo laden after the commencement of blockade." (2)

Fact of the existence of blockade.

I. With regard to the existence of a blockade: The actual blockade of a place is indispensable, according to the present law of Europe, to establish the penalties of breach of blockade. There have been a few instances infringing this rule, but these are marked exceptions. In 1689, England and Holland agreed, by treaty, that if the subjects of any King or State engaged in traffic with the French, or if their vessels were found sailing towards France, or if the vessels of any King or State were found in any place whatever, laden with goods for France, or for French subjects, they should be declared good prize. (3) This treaty, which in effect declared the whole of France in a state of blockade, was a clear violation of the rights of neutrals, which of course were not, as the treaty makes them, at the mere disposal of two belligerents. Another similar instance is the case of Russia in 1793, already noticed under the head of Contraband, when all neutral vessels laden for

(1) Rob. Rep. I. 85—154.

(3) Dumont, Corps Dipl. VII.

(2) Sir W. Scott on the Betsey, II. 238.

id. 93.

France were obliged to return to their own ports, or to make for some other neutral port. (1) This, which was also practically declaring the whole of France in a state of blockade, was acknowledged at the time to be a deviation from the Law of Nations which could only be justified by the extraordinary nature of the war then raging. With regard to the declarations of blockade, on the parts both of France and England, at the time of the Berlin and Milan decrees, I must refer to the ensuing chapter, as the discussion would interrupt, for too large an interval, the consideration of the subject now before us; and the hardships then inflicted upon neutrals were neither consistent with the Law of Nations, nor were they regarded at the time as anything more than exceptions justified by the exigency of the conjuncture, nor can they be ever appealed to as precedents by any future governments whatever.

The rule is explicit that the actual *existence* of blockade is necessary to involve the penalties of breach of blockade. A declaration of blockade, unaccompanied by the fact of blockade, does not establish a blockade. It was so determined by our Lords of Appeal in the war with Napoleon I. Admiral Jervis declared the West India Islands in a state of blockade, "but the Lords held, that as the fact did not support the declaration, a blockade could not be deemed legally to exist." (2) In this our code is in consonance with the limitation of blockade given by the Armed Neutrality of 1780, (3) in which it is stated, that "to determine what characterises a blockaded port, this term shall only be allowed in those cases where, from the arrangements of the power which is attacking with vessels stationary and sufficiently close, there is an

Declaration of blockade insufficient, if not actually existing.

(1) Charles de Martens, *Causes Célèbres*, II. 355.

(2) Rob. Rep. I. 83, 95.

(3) See the various treaties in De Martens, *Rec. III.* 158—270; the article is the same in all.

evident danger in entering." At the same time the accidental absence of the blockading squadron, from being blown off by the wind, does not constitute a suspension of the blockade, and any attempt to take advantage of such temporary removal, if the cause of absence be known, is an offence involving confiscation. (1)*

Previous knowledge requisite before penal consequences are entailed.

II. It is necessary that the parties should have known the existence of a Blockade, before they can incur penalties from attempting to enter the blockaded port. This is both the clear dictate of justice, and the rule as declared by a great number of treaties, and is the law established by the practice of Europe. Knowledge of the existence of blockade can be transmitted in two ways; first, directly, or *de facto*, when a vessel making for a port is warned off by the blockading squadron; and secondly, by notification, accompanied by the fact of blockade, where a belligerent government has notified to neutral governments, that a certain port is blockaded. One difference made by these two methods of giving warning is, that when a blockade existing *de facto* has ceased, otherwise than by mere accident or shifting of the wind, all restriction with regard to the place is done away with; but when a notification of blockade has been given, the blockade must be supposed, *prima facie*, to be in existence until such notification has been publicly recalled. To suffer the notification to continue in force after the fact has ceased, and to apply the notification again at a distant time, would be a fraud on neutral nations, of which a government is not rashly

(1) Rob. Rep. I. 87, 156.

[* The general rule with respect to the definition of blockade will no doubt be supplied for the future by the declaration annexed to the Treaty of Paris, 1856. "Blockades in order to be binding must be "effectual, that is to say, maintained by a force sufficient really to "prevent access to the shore line of the enemy."]

to be suspected:—It is possible that such a blockade may so expire *de facto*, but such conduct is not hastily to be presumed against any nation, and, until a case is clearly made out, a blockade by notification is, *primâ facie*, to be presumed to continue till the notification is revoked. (1) A notification to the subjects of one power does not immediately affect the subjects of another power; but after a time when, in every reasonable probability, the subjects of a neighbouring State would have become cognizant of a fact so notorious as a proclamation of Blockade, the latter would be affected by the notification addressed to their neighbours. (2) This is a rule which requires a lenient construction, but it is one of which the reasonable enforcement is only a just protection of a belligerent's rights. In the Armed Neutrality of 1800, the clause of the treaties in 1780, above cited, was inserted, with the addition that no vessel should incur the penalties of breach of blockade, unless she attempted, either by force or fraud, to enter a blockaded port after having been warned by the commander of the blockade regarding the state of the port. (3) If by this clause it were meant, and

(1) See Sir Wm. Scott's judgment on the *Neptunus*, from which the above is abridged. Rob. Rep. I. 171, 172. So also where a neutral government, which had received official notification of a blockade, afterwards received intelligence that the blockading squadron had been driven off by the enemy, it was held that neutral vessels were no longer bound by such notification, and if a squadron subsequently returned to the blockade of the same port, a fresh notification would be necessary.

(2) *Id.* II. 111, 112, *note*.

(3) See the treaties in De Martens, Rec. VII. 172—196. To

avoid misunderstanding, I insert the article in the original French.

“Que pour déterminer ce qui caractérise un port bloqué, on n'accorde cette dénomination qu'à celui où il y a, par la disposition de la puissance qui l'attaque avec des vaisseaux arrêtés et suffisamment proches, un danger évident d'entrer, et que tout bâtiment naviguant vers un port bloqué ne pourra être regardé d'avoir contrevenu à la présente convention, que lorsqu'après avoir été averti par le commandant du blocus de l'état du port, il tachera d'y pénétrer en employant la force ou la ruse.” De Martens, Rec. VII. 184.

I do not see what else could be meant, that no notification by one government to another was to be attended with any issue, and that nothing whatever, except a personal warning at the mouth of a port, was to have any result, it would be a direct violation of the Law of Europe as most distinctly recognised, and would be a complete encouragement to fraud, and a connivance, on the part of neutral governments, at their subjects' interference with the clearest rights of belligerents. It would be lawful, under this clause, for a whole fleet of neutral merchantmen to sail for a port which their government had been officially informed was blockaded, and, keeping out of the way of the blockading squadron in such a manner as to avoid communication, to hover about till the accident of a change of wind drove the blockading squadron to a short distance, and then, stealing in, to unload their succour to the besieged, although the latter might have been otherwise obliged to surrender the very next day from want of necessaries; and all this with complete impunity, with strict observance of the law, and under the high-sounding title of a vindication of the rights of neutrals. Very different is the Law of Nations as declared by Bynkershoek, who says, that ships hovering near a blockaded port may be confiscated, if an intention of steering them into the port can be shewn, either from the facts of the case, or the nature of the cargo. (1) The decisions of our Courts assert that, among European States, where the conveyance of intelligence is so rapid, it can never be permitted that a ship shall sail with a knowledge of the blockade, and proceed to the spot under pretence of there making further inquiry: ships so offending are confiscated. (2) Indeed, in every case in which a blockade is known, and in which a vessel sails with the intention of

(1) *Quæst. Jur. Pub. lib. I.* (2) *Rob. Rep. I. 335, note.*
cap. XI.

breaking the blockade, she is liable to confiscation. The sailing with an intention of evading blockade is "a beginning to execute that intention; and is to be taken as an *overt act* constituting the offence. From that moment the blockade is fraudulently evaded." (1) An exception to the rule that the sailing for a blockaded port involves confiscation was made in the case of subjects of the United States, and would of course apply to other American States similarly circumstanced. In the case alluded to, (2) Sir W. Scott said, that although the Americans were not exempt from the common effect of a notification, yet that their great distance from the site of the blockade made it impossible that they should have constant information of the continuance or relaxation of the blockade, and that "it was not unnatural that they should send their ships conjecturally upon the expectation of finding the blockade broken up after it had existed for a considerable time. A very great disadvantage indeed would be imposed upon them, if they were bound rigidly by the rule, which justly obtains in Europe, that the blockade must be conceived to exist till the revocation of it is actually notified. For if this rule be rigidly applied, the effect of a blockade would last two months longer upon them than upon the trading nations of Europe, by whom intelligence is received almost as soon as issued." Americans might therefore send their vessels when it was fair to conjecture that a blockade had, after a long continuance, terminated; but this inquiry should not be made at the mouth of the blockaded port, but at ports which lie in the way, and which can furnish information without furnishing opportunities of fraud.* Since that period,

(1) Rob. Rep. I. 156.

(2) The Betsey, Rob. Rep. I. 332—335.

[* In the present day, when the facility of communication by electric telegraph brings close together, for purposes of notice, places even

1799, the spirit of this decision has been embodied in definite treaties, which indeed give a wider scope of immunity, inasmuch as they even allow inquiry at the blockaded port. In the treaty between Sweden and the United States, in 1816, it was agreed, art. XIII., that considering the distance of the two countries no vessel destined for a port supposed to be blockaded at the time of her departure shall, on either side, be seized and condemned for a first attempt to enter the said port, unless it could be proved that she might have learned on her passage that the blockade still continued; but that a second attempt, made after warning, and during the same voyage, the blockade still continuing, should induce confiscation. (1) Exactly the same stipulation constitutes art. XIII. of the treaty of 1828, between Prussia and the United States. (2) A similar limitation is made by the additional article of the treaty between France and Brazil, in 1828, which stipulates that actual warning by the blockading squadron is necessary, on either side, to convey knowledge of the blockade, and that it is only an attempt to enter after such warning that can be punished by confiscation. (3) This treaty also declares that the proof of previous warning is to be shewn from the test usually resorted to, namely, the fact of the first warning having

(1) De Martens, Supp. VIII.
258.

(2) *Id.* XI. part II. 620.

(3) *Id.* XII. 61.*

the most remote, no such exemption from the operation of the ordinary presumption could be claimed,—except in the case, very likely to present itself in time of war, of the wire or cable being cut, and communication thereby suspended.—ED.]

[* See a list of more recent treaties made by France in Hall's "*Rights and Duties of Neutrals*," p. 132. Mr. Hall says that the French practice (of giving actual notice of a blockade and endorsing it on the ship's papers) seems to have arisen out of the doctrine of the Second Armed Neutrality, in the treaties concluded between the members of which the principle was first laid down.—ED.]

been noted on the ship's papers at the time of the visit from the blockading force. It is to be remarked that the exception now under notice has been made solely for American vessels in European courts, and the converse in American courts, it being distinctly laid down that, among European nations, it cannot be permitted that a vessel shall sail to a blockaded port, under pretence of inquiry at the very spot blockaded; and, in our courts, even in the case of Americans sailing for a blockaded port, it is declared that such port is not the place for inquiring whether the blockade still continues. (1)

III. The third and last point, the act of violation, has been partly considered under the two preceding heads, in which we have seen that, besides the actual attempt to break through a blockading squadron, the stealing in when this squadron has been blown off, and also the sailing for a blockaded port, among European nations, knowing it to be blockaded, are actual violations of Blockade. It remains to consider the violation of blockade by egress, which is regarded as equally criminal, and liable to the same consequences as violation by ingress. Bynkershoek confirms this, as conformable both to reason and to the custom of nations, (2) and our courts uniformly hold the same doctrine. (3) In cases of violation by egress, it is obvious that no notification or warning is necessary, after the blockade has been established for any length of time, as the existence of the blockade must unavoidably be known to all vessels lying in the blockaded port. (4) On the other hand, respect for the rights of neutrals requires that neutral vessels, actually laden before the commencement

Violation
either by
ingress or
egress.

(1) Rob. Rep. I. 335, *note*.

derick Molke, *id.* 171. The *Nep-
tunus*.

(2) *Quæst. Jur. Pub. lib. I.
cap. iv. p. 198.*

(4) *Id.* 152.

(3) Rob. Rep. I. 87. The *Fre-*

of the blockade, shall be freely allowed to come out with their cargoes, but such cargoes must be *bonâ fide* purchased and delivered before the commencement of the blockade; (1) taking in cargo after the commencement of the blockade is a violation of the blockade. (2) It is a pursuance of the same principle which declares that neutral vessels which have entered a port before the commencement of a blockade, may retire in ballast after the blockade has been established. (3)

How long
penal conse-
quences attach.

The Law of Europe, as declared by Bynkershoek, still continues in force, that the penalty of violation of blockade continues to hang over a ship during the whole of her return voyage, and that if she is taken at any time during this period, "she is taken *in delicto* and confiscated." (4)*

(1) Rob. Rep. I. 93, 152, 172.

(2) *Id. ubi sup.* and II. 298.

(3) *Id.* II. 119.

(4) See Bynkershoek, *Quæst.*

Jur. Pub. lib. I. cap. XI. p. 214,

and Rob. Rep. II. 130, where this passage of Bynkershoek is also cited.

[* It was decided in an important case before the Judicial Committee of the Privy Council, arising out of the Crimean War, that where a place has been blockaded for the purpose of preventing the importation of a particular article wanted by the enemy, it will not amount to a breach of blockade, if a neutral vessel leaves the blockaded place *exporting* a cargo of that particular article, especially if its exportation be forbidden by the enemy. (*Cremidi v. Powell*, 11 Moore's Privy Council Cases, 88, 115. See also Tudor's *Leading Cases, The Betsey*).

Ortolan (tom. II. liv. III. ch. IX.) and Hautefeuille (tom. III. p. 120) have introduced a theory based on a wholly erroneous conception of the nature of blockade. They lay down that blockade can only exist within the limits to which, for some purposes, the territorial rights

[of the blockaded belligerent over the sea adjoining his coast-line extend. But there is no basis for such a theory in fact, and the application of it in practice would impair the validity of indisputable principles with respect to blockade. The right to blockade is a pure war right, and has no relation whatever to artificial rules regulating in time of peace the limits of a State's jurisdiction, for a few special purposes, over the open sea.

Lord Russell in his reply of February 10th, 1863, to Mr. Edward Mason, agent of the Southern Confederacy, may be said to have put an interpretation on the meaning of a blockade being "effectual" according to the Declaration annexed to the Treaty of Paris of 1856. "There is no doubt," says he, "that a blockade would be in legal existence, although a sudden storm or change of wind blew off the squadron. Such an accident does not suspend, much less break, a blockade; whereas, on the contrary, the driving off a blockading force by a superior force does break a blockade, which must be renewed *de novo*, in the usual form, to be binding upon neutrals."

It has been held in England that it is not competent for a belligerent to blockade a port as against neutrals, while he allows his own or his enemy's merchant-vessels privileges of ingress and egress, for the purpose of trade, which were not allowed to neutrals. (See *The Francisca*, Moore's Privy Council Cases, x. 37, cited by Dana in his note to Wheaton, Part IV. ch. III.

It is to be noticed that neutral vessels of war have privileges against blockade. During the American Civil War the entrance of neutral ships of war into blockaded ports was allowed by the special orders of the United States' government; and the same government permitted neutral vessels of war to carry through the blockade the official despatches not only of their

[own governments, but of other friendly governments. (See Dana's note *in loc. cit.*)

Where the question is one of *intended* breach of blockade an important and sometimes a difficult inquiry arises as to what is a "continuous voyage." The mere fact of a neutral transshipping will not break the voyage, and sometimes both for purposes of breaking a blockade and carrying contraband, the formality is gone through of selling in a neutral port, but as to this Sir W. Scott puts the test "whether the cargo at that place is imported into the common stock of the country." The leading cases in reference to this subject and useful comments upon them will be found in an elaborate note to Dana's Wheaton, Part. IV. ch. III.—ED.]

CHAPTER X.

SKETCH OF THE "CONTINENTAL SYSTEM."

IN the preceding chapter we have considered the question of Blockade as existing according to the Law of Nations as acknowledged in Europe. In common with many other points affecting the rights of neutrals, the law of Blockade was strained, during the extreme bitterness which marked the war with the first Napoleon, in a manner which could neither be borne out by precedent, and which no deductions from reason could justify. Both sides, indeed, at the time, bore an indirect testimony to the unlawfulness of their severities, by each endeavouring to throw upon the other the blame of making recourse to such measures necessary; and at the same time that this inferential evidence was afforded by the belligerents, neutral governments marked their sense of the innovation by strong protests against the hardships inflicted, and, in the case of the United States, by retaliatory measures that ultimately terminated in a war, in which our construction of the law of Blockade was mentioned as one of the chief ingredients in the provocation.

The Law of Nations regarding blockade infringed by both parties during the last war.

It was partly the consideration of the topic being thus taken out of the rule, and regarded by all parties as an exception, which made it desirable not to interrupt the preceding chapter by introducing this subject of discussion; but it bears so immediately on the doctrine of Blockade, that some notice is necessary to avoid being essentially defective and incomplete. My limits prevent the insertion of anything but a mere sketch of

what has occupied a vast share of diplomatic correspondence, as well as occasioned much debate and pamphleteering, and I only trust I may have succeeded in my earnest wish to give an impartial abstract of a discussion, which is unfortunately characterised by much angry feeling. I am anxious to select from the materials before me the facts of the case, and to leave behind the animosity and partisanship with which I find them intermingled.

Origin of such
measures.

My readers will remember that, in 1806, the King of Prussia took possession of Hanover. His occupation of the electorate, which he at first declared to be provisional, became permanent when his territories near the Rhine were seized by Napoleon, who desired him to take Hanover as an indemnity. This act I am not now called upon to characterise, and it is only introduced here because it was coupled by Napoleon with a demand with which we are now concerned, to exclude British vessels from all Prussian ports. This demand was acceded to by the King of Prussia, who issued a proclamation, declaring that "the ports of the North Sea, as well as the rivers which flow into it, are closed to English shipping and commerce, as they were at the time when the French troops occupied Hanover." (1) This was dated 28th March, 1806. Our first measure of retaliation was a blockade of the mouths of the Ems, the Weser, the Elbe and the Trave, which was officially notified on the 8th of April, and an embargo was laid on Prussian vessels and property in the British ports. (2) On the 16th May, 1806, a circular was issued to the ministers of neutral governments resident in London, signed by Mr. Fox, then foreign secretary, declaring, that a consideration of the novel methods adopted by

(1) The original German, from which this is taken, is in *De Martens*, Supp. V. 435.

(2) *Id.* 436. *Annual Register* for 1806—155.

the enemy for the interruption of British commerce, had determined our government to issue orders for placing in a state of blockade all the coasts, rivers, and ports, from the Elbe to Brest inclusively, and that these rivers and ports were accordingly to be considered as actually blockaded: this blockade, however, was to be limited in its effect by a division of the line of coast into two parts, of which the part from Ostend to the Seine was to be considered as under the most rigorous blockade, while the rest of the line was allowed to be open to the navigation of neutral vessels, laden with other goods than contraband of war or property of our enemies, as long as these vessels had not been laden at a port belonging to, or occupied by, the enemies of the British government, or on the other hand, were not proceeding to such port from the blockaded line, and provided these vessels had not previously violated the blockade. (1)

This order, as far as concerned the district specified in the Prussian edict, seemed, as far as the Prussians alone were concerned, a tolerably exact retaliation for their act of exclusion. The Prussian proclamation declared that no British vessel should enter their ports, and the British proclamation forbade any intercourse between these ports and the territories of our enemies. The difference between the result of the two edicts was, that the Prussian affected British commerce solely, while the British not only retaliated on Prussian commerce, but also compromised the trade of neutrals with Prussian ports, although only to a limited extent, neutral trade from neutral ports being still allowed, and neutral trade between enemy's ports alone prohibited. Our order of the 16th May, 1806, was further restricted on the 25th September, by a notification that

(1) De Martens, Supp. V. 437.

the blockade was raised on that part of the line which extends from the Elbe to the Ems inclusively. (1)

Germ of the
"Continental
System" ob-
servable before
the peace of
Amiens in
1802.

Such was the commencement of the mutual restrictions on neutral commerce which were subsequently carried to so great a height. It is to be remarked that a germ of what was afterwards called the "Continental System," appeared during the previous war which had been terminated by the peace of Amiens. In the treaty of Bologna, for instance, in 1796, between France and the Pope, it was agreed, art. iv., that the ports in the papal dominions should be open to French vessels, but closed to the vessels of the powers at war with the republic. (2) Later in the same year Genoa was declared by treaty to be closed in a similar manner to British vessels. (3) In 1798, our government took the retaliatory measure of obtaining by treaty, art. ix., that the ports of the King of Naples should be closed to all French vessels, whether ships of war or merchantmen. (4) But in 1801, by the treaties of Foligno and Florence, the King of Naples was obliged to agree to close his ports against us, and also against the Turks, (5) and in the same year the harbours of Portugal were closed against us, in the same manner, by treaty with the French republic. (6)

"Berlin
decree."

To return to the year 1806. In the position of affairs which has been noticed, occurred the French occupation of Berlin subsequent to the battle of Jena, and Napoleon then published that proclamation which, from its place of issue, obtained the well-known name of the "Berlin decree." It bore the date of 21st November, 1806. This instrument set forth that considering, 1st. that England did not admit the Law of Nations as

(1) De Martens, Supp. V. 439.

(2) *Id.* Rec. VI. 239.

(3) *Id.* 252.

(4) *Id.* 531.

(5) *Id.* Supp. II. 336, 338.

(6) *Id.* Rec. VII. 374.

universally followed by civilized countries; 2ndly, that she made prisoners of war of merchant-seamen and other individuals of not military character; 3rdly, that she extended to merchant vessels and their cargoes, and to the property of individuals, the right of conquest which could only apply to the State property of an enemy; 4thly, that she extended the right of blockade to unfortified cities and ports, to harbours and to the mouths of rivers, while this right, according to reason and the usage of civilized nations, is only applicable to fortified places: that she declared blockaded places before which she had not a single ship of war, although a place cannot be deemed blockaded unless it be so invested that there is an evident danger in entering: that she declared blockaded places which her whole forces united would be unable to blockade, whole coasts and all an empire; 5thly, that this monstrous abuse of the right of blockade had no other purpose than to obstruct the communications of countries, and to raise the commerce and industry of England on the ruins of the industry and commerce of the continent; 6thly, that such being the evident purpose of England, whoever traded on the continent in the merchandise of England favoured thereby her designs and became accessory to them; 7thly, that this conduct of England, throughout worthy of the first ages of barbarism, had procured advantages for this power at the expense of all others; 8thly, that natural right allows to oppose an enemy with the weapons which he employs, and to contend as he contends, when he disallows all the notions of justice and all the liberal sentiments which result from the civilization of mankind;—on these considerations it was resolved to apply to England the usages which she had consecrated in her maritime legislation, and therefore the dispositions of the following decree were to be considered as a fundamental law of the empire, until England acknowledged that the law of war was the

same on land and at sea, that this law could not affect any private property whatever, nor any unmilitary persons, and that the right of blockade should be restricted to fortified places really invested by a sufficient force. The decree consisted of the following articles—

- I. The British Islands are declared in a state of blockade.
- II. All commerce and all correspondence with the British Islands is forbidden; in consequence all letters or packets addressed to England, or to an Englishman, or written in the English language, shall not be transmitted by the post-offices, but shall be seized.
- III. Every individual subject of England, of whatever rank or condition, found in countries occupied by the troops of France or of her allies, shall be made prisoner of war.
- IV. Every magazine, all merchandise, and property of whatever description, belonging to an Englishman, shall be declared good prize.
- V. All traffic in English merchandise is forbidden, and all merchandise belonging to England, or the product of her manufactories or of her colonies, is declared good prize.
- VI. Half the produce of the goods confiscated under the foregoing articles shall be employed to indemnify those merchants whose property has been captured by British cruisers.
- VII. No vessel coming directly from England or from the English colonies, or which has been there after the present decree, shall be received into any port.
- VIII. Any vessel contravening the above edict by the use of false papers shall be confiscated, together with her cargo.
- IX. The French and Italian prize courts are charged with the judgment of all causes connected with this decree.
- X. Communication of the decree to be made to the allies of France, whose subjects are similarly the victims of the injustice and of the barbarous maritime legislation of England.
- XI. The various French ministers charged with the execution of the decree are named. (1)

(1) See the decree at length, De Martens, Supp. 439—442.

Such were the provisions of the decree by which it was attempted to paralyze the industry, and neutralize the maritime superiority of England, at a time when, in the language of Sir Walter Scott, one belligerent was so completely master at sea, and the other on land, that there seemed to be no issue to their contest, unless they could find some third element on which to settle their pretensions. (1) With regard to the accusations on which the decree was, professedly, based, it is curious to remark that in two out of the three charges on which it especially relied, France had been an offender in a manner quite unprecedented. The three points specified were our seizing merchant-seamen and other persons of private character at sea, our confiscating private property, and our extension of the rigour of blockade. On the first of these charges it is to be remarked that it came from the government of a country which had, in 1798, decreed that all neutral sailors found in English vessels should be *put to death*; (2) with regard to the second charge, the person who was now accusing us of disregarding the Law of Nations with regard to private property, had, in 1796, seized the property of the English merchants at Leghorn, and obtained by the sale 12,000,000 francs for the use of his army, (3) this seizure of private property on land being in direct opposition to the usage of war, while such seizure at sea was sanctioned by the constant, uncontested, practice of Europe during all history, with the single exception of the treaty of 1785, between the United States and Prussia; and yet this infringer of the Law of Nations ventured to accuse us as violators of that law, when in this respect we were following its regular precepts. With regard to the third question, of blockade, it is undeniable that our construction of the rights of blockade was irregular, and was only

Observations
on the "Berlin
decree."

(1) Life of Napoleon.

IV. 451.

(2) Alison's Hist. of Europe,

(3) *Id.* III. 62.

defensible on the ground of retaliation; but it must be considered how great had been the provocation by the Prussian government, while at peace with us, seizing a country which, though not an integral part of our dominions, yet belonged to the British monarch, and at the same time closing its ports against us; and that great part of our proclamation had been rescinded before the Berlin decree had been issued—our notification of the raising the blockade from the Elbe to the Ems inclusively, having been dated 25th September, while the decree was dated 21st November. The blockading whole lines of coast was not without precedent, though it was a rigorous application of blockade; while, on the other hand, the limitation of those who ventured to call themselves the assertors of the Law of Nations, namely, the confining the right of blockade to fortified places, (*places fortes*) and leaving harbours exempt from such restraint, was entirely new and unheard of, and in opposition to the clear principle of blockade.

Disasters
arising there-
from.

But perhaps the framers of the decree would themselves have inwardly laughed at any one who set himself to consider seriously the *rights* of a case in which was manifested the constant practice of the government from which it emanated, namely, an utter disregard of all rights which stood in the way of their immediate object: rights, unhappily, being seldom thought of in the French career of conquest—unless in a manifesto they were referred to in order to make oppression plausible. Proceeding then to the consequences of the decree, it was confessed, by those who had derided the proclamation of the blockade of the British islands from a government that seemed only to construct vessels for the purpose of sending them as a prey to our cruisers, that most disastrous effects were the result of a measure which isolated England from some of her best markets,

which induced ruin on a vast number of the great commercial houses in our country, and which, by the extensive injury it occasioned, went far towards fulfilling the intentions and desires of our enemy. (1)

The first measure of retaliation, on the part of the British government, was our Order in Council dated 7th January, 1807, which declares, that whereas the French decree prohibited neutrals from trading either with, or in the merchandise of, this country, and had proclaimed all the British dominions to be in a state of blockade, at a time when the fleets of France and her allies were confined to their ports by the British navy; and whereas such attempt would give the right of retaliation, and would warrant our imitating the French decree, by prohibiting all commerce with France, a prohibition which we might actually enforce by investing with our fleets the ports and coasts of the enemy, so as to make the entrance or approach thereto manifestly dangerous; and whereas our government, unwilling to distress so severely the trade of neutrals, was yet bound, by a regard to the rights and interests of the people, to restrain this violence, and to retort upon the enemy the evils of their own injustice; it was ordered by the king, by and with the advice of his privy council, "that no vessel shall be permitted to trade from one port to another, both of which ports shall belong to, or be in possession of, France or her allies, or shall be so far under their control, as that British vessels may not trade thereat;" and neutral vessels contravening this order, after warning, or after the lapse of sufficient time for receiving information of the order, were to be captured, and with their cargo condemned as lawful prize. (2)

(1) Annual Register for 1806,
p. 323.

(2) Annual Register for 1807,
p. 236.

Order in
Council of
11 Nov. 1807.

This order was followed by an interval of ten months without further restriction by either government. But on the 11th November, 1807, another Order in Council was issued, which declared that as the order of the 7th January had not attained its purpose of obliging the enemy to withdraw his decree, or of obliging neutrals to obtain its revocation, the decree having on the contrary been renewed with rigour, it was ordered that all ports and places of France, or her allies, or of any other State from which, although at peace with Great Britain, the British flag was excluded, and all ports and places in the colonies of the enemies of Great Britain, should be submitted to the same restrictions with regard to commerce and navigation, as if they were closely blockaded by the British forces. It was further ordered that all commerce in the produce or manufactures of the said States and colonies should be deemed illegal; and that all vessels engaged in such trade should be taken, and, with their cargoes, adjudged good prize for the benefit of the captors. Nevertheless, as the government did not desire to expose neutrals to any other restrictions than those necessary for defeating the views of our enemies, and causing their injustice to recoil upon themselves, it was allowed to neutrals to trade with the colonies of the enemy for goods purchased for their own consumption, and even with the ports of the enemy, provided such commerce were carried on by means of the British ports in the following manner, viz. no vessel was to be seized which belonged to a State not declared by the present order subject to the restrictions of blockade, provided such neutral, clearing out either from a port of its own country, or from a free port in the British colonies, 1st, sailed direct from the enemy's colonies to a port of its own State, or to a free port of the British colonies; or 2nd, sailed direct to its port of destination from the British islands, from Gibraltar, from Malta, or from any port belonging to

the allies of Great Britain; or 3rd, sailed from any of the States placed under the restrictions of blockade, to any port in Europe belonging to Great Britain. Neutral vessels acting in contravention of these orders, were to be confiscated with their cargoes; but all neutral vessels, belonging to States from which the British flag was not excluded, which complied with these orders, were to be, with their cargoes, exempt from seizure, unless such cargo were enemy's property, or unless the ship had violated blockade, or otherwise become liable to confiscation as lawful prize. It was further added, that as certain States, without being at war, had submitted to the French decree prohibiting all trade in British produce or manufactures, and as the merchants of these States obtained, from the enemy's commercial agents resident in neutral ports, certain documents called *certificates of origin*, which declared that the cargoes were not of British produce or manufacture, and as it was necessary to oppose a system directed against the commerce of our country, it was ordered that every vessel found carrying such certificates, should, together with such part of the cargo as belonged to persons employing such documents, be seized and confiscated as the prize of the captor. (1)

This Order in Council was followed by some additional and explanatory orders, which it is not necessary here to particularise, except that one of them declared that as the sale of ships from a belligerent to a neutral was deemed illegal by the enemy ships so transferred would also be deemed illegally sold by us, and would be considered lawful prize accordingly: another order regulated the manner in which the commerce of neutrals was to be carried on, and specified the branches of trade in which *licences* were to be obtained from our

(1) De Martens, Supp. V. 446—449.

government before such trade could be engaged in. (1)

"Milan
decree."

The next important move in this war of restrictions, was the "Milan decree," dated 17th December, 1807. In this Napoleon stated, that, considering that the British orders of 11th November obliged neutrals not only to submit to the search of our cruisers, but also to come to England and endure the imposition of so much per cent. on their cargo, regulated by the English legislature, considering that by these acts the English government had *denationalised* the ships of all the nations of Europe, and that if neutrals allowed this tyranny to be consecrated by usage, the English would thereby establish it as a right, "as they had profited by" the tolerance of governments to establish the infamous "principle that the flag does not cover the cargo, and" to give to the right of blockade an arbitrary stretch of "signification which affected the sovereignty of all" States,"—on these considerations, it was decreed, i. that every vessel, of whatever country, which submitted to the search of an English vessel, or which submitted to make a voyage to England, or payed any tax to the English government, was declared *denationalised*, had forfeited the protection of its flag, and had become English property: II. that if vessels so denationalised enter the ports of France or her allies, or fall into the power of the French cruisers, they are declared good prize: III. that the British Islands are declared in a state of blockade by sea and by land, and any vessel sailing to or from Great Britain or her colonies, or countries occupied by her troops, are declared lawful prize: IV. that these measures, which are but a just reciprocity for the "barbarous system of the English government, which assimilates its legislation to that of

(1) De Martens, Supp. V. 449—452, and Ann. Reg. for 1807, p. 333.

Algiers," shall continue in force till the English government shall return to the principles of the Law of Nations; and v. the French ministers are charged with the execution of the decree. (1) This was followed in the next month by a decree, dated Paris, 11th January, 1808, which declared that any passenger or sailor deposing that the vessel in which they sailed had become subject to the penalties of the above decree, should receive one-third of the nett produce of the sale of the ship and cargo, and that any French officer convicted of favouring any contravention of the decrees should be punished as guilty of high treason. (2)

Such is an abstract of the proceedings by which the trade of neutrals with either belligerent was, as far as mere decrees could go, interdicted by both parties; one declaring that if neutrals did not comply with certain regulations, their vessels should be seized, and the other declaring that such seizure should ensue if neutrals did comply with these regulations. As a matter of fact, a considerable trade was carried on in spite of all these restrictions; but still the commerce of neutrals was hampered by these decrees, which were condemned by them as uncalled for oppression and as unprecedented innovations. In this country also the measures were canvassed with much keenness. In Parliament the ministerial orders underwent a sifting investigation by the opposition; but the debates are less interesting than they would otherwise have been, from the spirit of party which was too obviously mixed up with a subject of very high import as a question of national justice; and also, the ministry having changed between the orders in January and those in November, the ministers who framed the latter decree defended themselves by appealing to the order of January, of

Debates in
parliament
concerning
these measures.

(1) De Martens, Supp. V. 452. (2) *Id.* 457.

which they said theirs was only a continuation; and the debates took that personal turn which, in party discussions, seems to tell better than almost any examination of the substantial positions of an argument. My limits preclude the possibility of doing more than stating that the assertions of the opponents of the measure were, that although the Berlin decree was nominally a flagrant violation of neutral rights, yet that as a matter of fact it had never been acted upon; that commerce was prosecuted in its usual channels; and that the American government had actually received an indirect assurance from the French government that this decree would not be carried into execution; that our own decree was not only unjust but impolitic; and that the system of obliging neutrals to land cargoes and pay duties on them in our ports, was a measure intended principally to benefit our West India interest at the expense of neutral merchants. The ministers contended, on the other hand, that our orders were called for as measures of retaliation; that they were justified by the decrees of the enemy; that neutrals must submit to our restrictions as a consequence of their not having resisted the restrictions of our enemy; and that the obliging neutrals to unload and pay duties here, was a measure resorted to as likely to induce the enemy to rescind his orders, by raising prices to his subjects as the result of his attacks on our commerce. (1)

Measures
taken by the
United States.

Measures so greatly interfering with the trade of neutrals were by no means quietly acquiesced in by the United States, whose subjects had been carrying on a lucrative commerce in channels which these neutral

(1) See the debates and remarks on the Orders in Council in the Annual Register for 1807 and 1808, and some excellent articles

on the opposition side in the Edinburgh Review, Nos. xv. xxi. xxxiii. xxxviii.

denunciations now either closed entirely or rendered highly perilous. In December, 1807, an embargo was laid on all shipping in American ports, all vessels, except ships of war, being forbidden to leave the United States ; a measure which was confirmed, with additional stipulations, and the threat of heavy penalties, in the March following. This preparatory step not obtaining the end desired, on the 1st March, 1809, an act was passed prohibiting all friendly intercourse with France and Great Britain, as long as their restrictive measures continued in force. The former embargo was withdrawn for all vessels but such as belonged to these nations. All vessels, whether of war or of commerce, belonging either to Great Britain or France, were prohibited from entering the ports of the United States, excepting such ships as brought despatches from their government, and excepting packet-boats having no goods on board. No person was to afford any assistance either to French or British vessels, except in cases of damage, and any vessel belonging to subjects of these powers entering the ports of the United States after the 20th May was to be confiscated. All goods, the produce or manufacture of Great Britain or France, or of their colonies or dependencies, or of countries effectively in their power, were prohibited to be imported, under penalty of forfeiture and a fine of three times their value. As soon as either Great Britain or France revoked their decrees, so as no longer to violate the neutral commerce of the United States, the president was authorized to issue a proclamation, declaring that intercourse with that State should revert to its usual footing. (1)

On the 26th April, 1809, another Order in Council was issued by the British government, declaring that

Order in Council relaxing our previous orders.

(1) See translations of the acts 459, and 475—482. in De Martens, Supp. V. 455—

certain relaxations were to be made in the rigour of the previous orders. By that instrument, all the ports of Holland to the Ems inclusively, all the ports of France, and of the colonies and dependencies of these States, and the northern part of Italy as far as Pesaro and Orbitello, were to be considered as blockaded by the British forces, and all ships sailing to or from the places above specified were declared, together with their cargoes, to be liable to confiscation as good prize. (1)

Decree of
Antwerp and
of Fontaine-
bleau.

By this order, the line of coast subject to the restrictions of blockade was greatly diminished in extent; but as the coasts of France were still subjected to the full rigour of blockade, the author of the Berlin and Milan decrees had no reason to alter his vindictive system. Passing over many of the interesting documents which are found in the valuable collection to which such frequent reference is made, I must cursorily notice the "Decree of Antwerp," dated 25th July, 1810, which declares that every vessel sailing for a foreign port must receive a *licence* signed by the Emperor, and that all vessels engaged in the coasting trade are to give security to prevent such vessels from unloading in a foreign port. (2) In the autumn of the same year appeared the curious "Decree of Fontainebleau," dated 19th October, 1810, which declared that all merchandise whatever, the produce of the British manufactories, whether found in warehouses or in the magazines of the custom-houses in France, should be publicly *burnt*. The same fate was decreed, by succeeding articles, for all British manufactures found in Holland, the Grand Duchy of Berg, the Hanse Towns, the kingdom of Italy, the Illyrian provinces, Naples, the parts of Spain occupied by the French, and in

(1) See translations of the acts
in De Martens, Supp. V. 483.

(2) De Martens, Supp. V. 512.

general in all places occupied by the French troops. (1) This decree it is not necessary to criticise at any length; its operation was not to destroy the property of the enemies of France, but to destroy what had become French property, and it less resembled the design of a statesman than the petulance of a child venting its anger on inanimate objects. The decree is useful as illustrative of character, and serves to shew to what extremity of vindictive feeling the animosity of Napoleon had arrived against the only country which thwarted his designs.

In 1812 a report, dated the 10th March, was addressed to Napoleon by his minister for foreign affairs, concerning the maritime rights of the British, and the operation of the Berlin and Milan decrees. A reply was published by the British government, dated the 21st April, of the same year. In these state papers the claims of both parties are explained at length; but the limits of the present work prevent the insertion of the arguments, nor do I think that the French exposition requires any laboured analysis to make its flimsiness apparent. I believe that any one who reads it will be brought by the arguments themselves to conclusions the reverse of those which the writer intended; but if he should need a commentary, he will find a good one in the reply of the British government. (2) In the conclusion of the latter document it was stated that, as our Orders in Council had been entirely measures of retaliation for the Berlin and Milan decrees, as soon as these decrees were revoked by the enemy, our decrees should, *eo facto*, and without further notice, cease to be in operation. On the 23rd June following, an Order in Council was published, proclaiming, that—in virtue of this latter declaration, and as the chargé d'affaires of

French report
concerning the
Continental
system.

- (1) De Martens, Supp. V. 522. at length in De Martens, Supp.
(2) The documents are found V. 530—535, and 542—546.

the United States had presented a copy of an act (then for the first time communicated to our government), by which, as far as concerned vessels of the United States, the Berlin and Milan decrees were annulled by the French government—our Orders in Council were also declared to be rescinded as far as regarded American vessels, and their cargoes of American property. This revocation of our orders was, however, only to take effect in the event of the American government rescinding their order by which their ports were closed against our vessels of war and commerce. (1) Before the publication of this Order, war had been already commenced by the American government, on the 18th June,—a war which was terminated by the treaty of Ghent in 1814, when the overthrow of the power of Napoleon, and the restoration of peace, put an end to the vexatious questions which had occasioned hostilities.

Considerations
on these
various
measures.

The above is but a very brief abstract of the lengthy diplomatic papers to which the restrictions of the Continental System gave occasion. With regard to the justice of the case, I hope that it is not national prejudice which inclines me to believe that our country is not liable to much reproach. Our measures were strictly retaliatory. At the time of the publication of the Berlin decree, nothing had been done by our government to warrant such aggression, and the decree was clearly dictated by a desire to wrest the Law of Nations into an instrument for injuring those with whom Napoleon could not cope in maritime warfare. Our subsequent Orders in Council certainly interfered with the rights of neutrals, but such interference was in a great degree rendered justifiable by neutrals not having resisted the attempts of our opponent. If one belligerent attempts to injure his enemy, by acts which

(1) De Martens, Supp. V. 547—549.

violate the rights of neutrals, and if these neutrals offer no resistance to such violation, it cannot be expected that the other belligerent shall submit to be attacked in this manner without retaliating upon his enemy by similar measures. It is as if our enemy attacked us by marching across a neutral territory; he violates neutrality by so doing, but it is surely no longer incumbent upon us to respect the neutral territory; we are not called upon to wait upon the borders and allow our enemy to injure us under the protection of our respect for neutrality; it is clearly our right also to march into the neutral territory, if such invasion be likely to forward our purposes. It was the same thing with the question we are now considering:—if the American government had passed a non-intercourse act against France, to continue in force as long as the Berlin decree existed, this vindication of their neutral rights would have prevented any invasion of those rights on our part. On this point it is important to remember, that there seems to have been some understanding between the French and American governments, that the Berlin decree was not to be enforced against ships of the United States; but no official notification of this intention was conveyed; nor am I aware that this was even known in England till after the publication of our Orders in Council; certainly at the time of the publication of our Orders, nothing had been done by the American government to vindicate their neutrality, but the United States stood in the position of having their neutrality made by our enemy into an instrument for our detriment. Supposing this position to be true, our government was undoubtedly justified in preventing our country from being injured through a neutral power; and the evils which the latter sustained by our measures must be regarded as principally consequences of their own omissions, in not having repelled the first aggression. Sufficient time was allowed for this pur-

pose; the Berlin decree was dated November, 1806; our Order of January, 1807, merely closed the coasting trade of the enemy to neutrals, and it was not till November, 1807, twelve months after the date of the Berlin decree, that our measures of retaliation were proclaimed.

American non-intercourse act

The American non-intercourse act was a measure which seemed both just and politic. Powers acting in such flagrant violation of neutral rights, however one or both might be justified by the necessity of the case, could not complain because they were no longer admitted on the footing observed in peace towards them: and, on the other hand, it was expedient to prevent commerce being carried on, at a time when both parties in the war had exposed all property to capture. Had the non-intercourse act been passed at an earlier period, it might probably have prevented the evils which ensued,—and war was among those evils; but saying what politicians should have done when you have the results before you, is merely prophesying after events have occurred.

Conclusion.

It seems then that both the British and the American governments had good grounds for measures, which could hardly be said to have originated with themselves, so much as to have followed as consequences of French aggression. It is not likely that similar conjunctures will again occur; the evils which then raged were immense;—indeed the history of those times supports morality, less by affording precedents for imitation, than by the respect for rights which is produced by observing the consequences of their violation.

CHAPTER XI.

SEARCH.

THE right on the part of ships of war to visit and search merchant vessels during the continuance of war has been granted by all writers of any authority. The right of search is indeed a sort of necessary complement to the rights of confiscating contraband and the property of enemies. If any maritime capture of any description be allowable, then the right of search must be granted, in order to ascertain whether the ship or cargo encountered, be liable to seizure. It is equally the law of Europe and of America that resistance to visitation and search constitutes a lawful prize of the neutral vessel and cargo so resisting.

Necessity of Search.

Bynkershoek does not discuss the question at length, but mentions incidentally, and as a thing uncontested, the right of stopping a neutral vessel, in order that it may appear, not from the flag, which may be fraudulently assumed, but from the ship's papers, whether the vessel be really neutral. (1)

Opinion of Bynkershoek.

Valin says, that refusal to shorten sail and submit to search, on the part of a merchant vessel, when summoned by a commissioned vessel, entails confiscation. (2)

Of Valin.

(1) *Quæst. Jur. Pub. lib. I. cap. XIV.*

says, was merely a renewal of the article LXV. in the ordonnance of 1584, and was similar to the Spanish ordonnance of 1718.

(2) *Ordonn. de la Mar. liv. III. tit. IX. art. XII.* This article, Valin

Of Vattel. Vattel says, that we cannot prevent the conveyance of contraband goods without searching neutral vessels, and we have therefore a right to search them, and that, although formerly the right has been contested, yet at present, a neutral ship refusing to be searched would from that proceeding alone be considered as lawful prize. (1)

Of De Martens. De Martens says, that a merchant vessel must submit to visitation from a commissioned vessel, in time of war, under penalty of confiscation. (2)

Of Kent. Kent says, that "the duty of self-preservation gives to belligerent nations this right." "The doctrine of the English Admiralty on the right of visitation and search, and on the limitation of the right, has been recognised, in its fullest extent, by the courts of justice in this country." (3)

Of Sir William Scott. Sir William Scott said, "I stand with confidence upon all fair principles of reason; upon the distinct authority of Vattel, upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down, that by the Law of Nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequence of confiscation." (4)

Cases where the right has been denied. It is mentioned by Vattel, that some powerful nations have, at different times, refused to submit to search; and he quotes a case, mentioned in the notes to the *De Jure* of Grotius, in which the French denied this

(1) Droit des Gens, liv. III. ch. VII. § 114.

(2) Précis, liv. VIII. ch. VII. § 321.

(3) Commentaries on American Law, I. 153, 154, 155.

(4) The Maria, Rob. Rep. I. 368.

right to the English, in the reign of Elizabeth. (1) An objection to the right of search was advanced, in a vague manner, by the Prussian memorial, in 1752, (2) and it was mentioned that we had objected to the search of the Spaniards, and had noticed it as a grievance in our manifesto in 1739; but, in this latter case, we admitted the right of visitation, as far as the inspection of ship's papers went,—which latter exercise of the right of visitation is all that is usual at the present day, unless irregularity or suspicious circumstances make further inquiry necessary, and a power of recovering damages always exists in case such detention shall have been improperly made.

In treaties the right of search has been constantly recognised, and the manner in which it is to be exercised is constantly mentioned: this is usually agreed to be by the vessel which searches remaining not nearer than cannon shot distance from the ship visited, and sending a boat with not more than two sitters besides the rowers, which two persons shall inspect the ship's papers, of which the form is usually settled by the treaty, and if these papers are found to be regular, and to afford no reason for detention, the ship is to be allowed to proceed on her passage. In case of suspicious circumstances, the ship might be brought in for further inquiry; but it would be at the peril of the parties detaining, should it appear that the detention has been captious or unreasonable. The formality of search, as above mentioned, is specified in the following treaties among others:—in our Swedish treaty of 1661, art. XII., which declares that if the proper passports be found on board, no further inquiry shall be made; but if the formal certificate be not produced, or there be other cause of suspicion,

Treaties on
this subject.

(1) See Grotius de Jure, lib. Rob. Rep. I. 365—368.
III. c. 1, § v. note 4. See also the (2) Charles de Martens, Causes
notes in the case of the Maria, Célèbres, II. 21.

then the ship ought to be searched, which shall be deemed justifiable in this case, and in no other: (1) a similar article is found in our Danish treaty of 1670, art. xx.: (2) a similar stipulation is found in our treaty with Dantzic, in 1706: (3) in our treaties with the States General, in 1667, (4) and in 1764: (5) in our treaty with France, at Utrecht, in 1713, arts. xxi. and xxiv.; (6) and at Versailles, in 1768, arts. xxiv. and xxvi.: (7) in our treaty with Spain, at Madrid, in 1667: (8) in a treaty between France and Hambro, in 1769: (9) between France and the United States, in 1778: (10) between the States General and the United States, in 1782: (11) between the United States and Sweden, in 1783: (12) between the United States and Prussia, in 1785 and 1799: (13) between Russia and Sicily, in 1787. (14) Many other examples are before me, but these are sufficient to shew that the formality of search, as above described, has been for a long succession of years recognised by all the principal maritime powers of Europe. A solitary exception occurs in the treaty between France and Russia, in 1787, in which half cannon range is the distance prescribed. (15) With the Barbary powers the stipulations of treaties enforce the same form of search, as far as sending not more than two persons on board, but the duty of remaining at cannon shot distance is not usually specified. (16)*

(1) Chalmers, I. 56.

(2) *Id.* 89.

(3) *Id.* 108.

(4) *Id.* 156 and 165.

(5) *Id.* 180.

(6) *Id.* 404, 405.

(7) *Id.* 533, 534.

(8) *Id.* II. 14.

(9) De Martens, Rec. I. 646.

(10) *Id.* II. 600.

(11) *Id.* III. 455.

(12) *Id.* 577.

(13) *Id.* IV. 44, and VI. 682.

(14) *Id.* IV. 238.

(15) *Id.* 212.

(16) *Vide* Chalmers, II. 364, 346, 367, 408, 412, 424, and De Martens, Rec. I. 48. III. 763. IV. 127, 249. VI. 136, &c. &c.

[* Ortolan (liv. III. ch. vii.) notices that in the majority of the older treaties it is provided that the visiting ship shall remain beyond

Much discussion took place about half a century ago on the question, whether or not the right of search could be exercised on merchant vessels sailing under the Convoy of a ship of war. This claim to exemption, which it was attempted to enforce by the Armed Neutrality of 1800, was not then brought forward for

Search of ships sailing under Convoy.

cannon shot, in others, at cannon shot; some permit approach within a distance of half cannon shot. "One can at once see," he adds, "that these clauses have not been drawn by sailors. There are circumstances depending on the state of the wind and the sea in which it would be unpardonable for a commander to risk a boat and its complement of men for such a distance as cannon shot, and, still more, for a greater distance." It was said in a leading American case (case of the *Marianna Flora*, 11 Wheaton's Rep., pp. 48—50. See Phillimore, vol. III. (Part X. ch. III.), "that the court was not disposed to admit "that there exists any such universal rule or obligation of an *affirming gun*" (the French *semonce* or *coup d'assurance*), "as was suggested "at the bar. It might be the law of the maritime States of the European Continent, founded on their own usages or positive regulations, "but it did not hence follow that it was binding upon all other nations." In some cases, according to modern practice, the commander of the belligerent vessel contents himself with summoning, or rather inviting, the captain of the suspected vessel to come on board the belligerent vessel and bring his papers with him. Heffter, § 169. Hautefeuille, (tom. III. tit. XI.), describes the proceedings in some detail, and notices that the suspected vessel can only be required to take a passive and not an active part; that it must stop, and submit to the search, if after production of papers it is demanded, but it cannot be required to approach the belligerent vessel. The "ship's papers," which afford the first evidences of the character of the ship, vary slightly with the national laws of each State. In England they are (1) the certificate of registry, which states the name of the ship and port to which she belongs, her tonnage, build, and master's and owner's names; (2) the "charter-party" or documentary evidence of the contract of affreightment; (3) the bills of lading or copies of receipts for goods on board; (4) the account of the crew; (5) the agreement with the seamen; (6) the official log-book; (7) the "manifest," or accurate account of all goods shipped, and by whom and to whom consigned. In addition to such papers as these, in time of war a *passport* or *sea-letter* from the government of a neutral State is given by way of permission to the master of the vessel to proceed on his intended voyage. This usually contains the name and residence of the master, and the name and destination of the vessel.—ED.]

the first time. Soon after the peace of 1654, the English searched some Dutch merchantmen under the Convoy of a Dutch man of war; the question was discussed by the States General, and they came to the decision, that the refusal to allow merchantmen to be searched could not be persisted in.(1) A century afterwards, in 1762, the Dutch contended that the presence of Convoy exempted merchantmen from search.(2) In the Armed Neutrality of 1780, no stipulation was made that the presence of Convoy should exempt from search; but about this time a desire to obtain such immunity became prevalent in several neutral States. In the Orders of the States General, issued on 26th January, 1781, to regulate the conduct of their cruisers, it was desired by art. VI., that with regard to ships under Convoy, belief should be given to the declarations of officers of Convoys that the ships under their protection had no contraband of war on board, according to the full information which they must possess, and that no subsequent visit should be required.(3) By the treaty between the United States and the States General, in 1782, it was agreed by art. x., that it should not be required to search the papers of vessels convoyed by ships of war, but that belief should be given to the word of the officer in command of the Convoy.(4) A similar stipulation was made by art. XVIII. of the treaty between Russia and Denmark, in 1782; (5) by art. XII. of the treaty between Sweden and the United States, in 1783; (6) by art. XIV. of the treaty between the United States and Prussia, in 1785; (7) by art. XXXI. of the treaty

(1) See an excellent article in the *Edinburgh Review* for Oct. 1807, No. XXI. See also the notes to the case of the *Maria*, in Rob. Rep. I. 365—368.

(2) Alison's *Hist. Europe*, IV.

459.

(3) De Martens, *Rec.* III. 281.

(4) *Id.* 437.

(5) *Id.* 475.

(6) *Id.* 571.

(7) *Id.* IV. 43, renewed in 1799.

between France and Russia, in 1787; (1) by art. xx. of the treaty between Russia and the Sicilies, in 1787; (2) by art. iv. of the treaty between the United States and Morocco, in the same year; (3) by art. xxv. of the treaty between Russia and Portugal, also in 1787; (4) by art. v. of the treaty between the United States and Tunis, in 1797; (5) by art. xix. of the treaty between the United States and France, in 1800. (6)

Thus, at the close of the last century, the principle that the presence of Convoy should obtain exemption from search, had been recognised by all the principal maritime powers excepting Great Britain and, I believe, Spain. In none of our treaties had this exemption been stipulated, and on its being attempted to be enforced against us a serious collision took place between this country and some of the neutral powers. In January, 1798, a fleet of Swedish merchantmen sailing under Convoy of a ship of war was met in the British Channel by a British squadron, under the command of Commodore Lawford. On the latter attempting to exercise the right of search on the merchantmen, the Swedish officer shewed his instructions to resist search, and, in case of its being violently attempted, to oppose violence by violence. A British officer placed on board one of the merchantmen, was taken out by the Swedish frigate, and resistance having thus been made, the British squadron captured the fleet of merchantmen, which was done in the night to prevent unnecessary bloodshed, the Swedish officer declaring, that had it been done in the day he would have resisted, and expressing his regret that he had not

Case of the
Swedish Con-
voy.

(1) De Martens, Rec. IV. 212.

(2) *Id.* 238.

(3) *Id.* 249.

(4) *Id.* 328, renewed in 1798,
art. xxii.

(5) *Id.* VI. 406.

(6) *Id.* VII. 105.

exchanged broadsides. On the question of prize arising from this capture coming before the Court of Admiralty, Sir William Scott, in the case of the *Maria*, gave a judgment which would of itself have placed his name in the highest rank as an authority on the Law of Nations, and which conveys to the reader the satisfaction of at once exhausting the subject, and of settling definitely what had previously been indistinct and disputable. After referring to the responsibility under which he felt himself as the judicial organ of the Law of Nations, and mentioning his sense that he was called on to regard with indifference all present purposes of particular national interest, and to decide this question according to the known Law of Nations, exactly as he would determine the same question if sitting at Stockholm, asserting no pretensions for Great Britain which he would not allow to Sweden under the same circumstances, Sir William Scott proceeded to decide on the main question of search, which he considered under three heads. 1st. He stated that the right of visiting and searching merchant ships on the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, by the lawfully commissioned cruisers of a belligerent nation, was a right so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can be legally captured, it is impossible to capture. The right was clear in practice, for practice is uniform and universal on the subject; treaties refer to it as pre-existing, and all writers on the Law of Nations unanimously acknowledge it. 2dly. With regard to the question of Convoy, the authority of the sovereign of a neutral country being interposed in any manner of mere force, cannot legally vary the right of a lawfully-commissioned belligerent cruiser. If a Swedish commissioned cruiser, during the wars of his own country, has

a right, by the Law of Nations, to visit and examine neutral ships, the King of England, being neutral to Sweden, is forbidden by that law to obstruct the exercise of such right with respect to the merchant ships of this country. Such obstruction would be an opposition of illegal violence to legal right. "Two sovereigns may unquestionably agree, if they think fit, as in some late instances they have agreed, by special covenant, that the presence of one of their armed ships along with their merchant ships shall be mutually understood to imply that nothing is to be found in that Convoy of merchant ships inconsistent with amity or neutrality; and if they consent to accept this pledge no third party has a right to quarrel with it, any more than with any other pledge which they may agree mutually to accept. *But surely no sovereign can legally compel the acceptance of such a security by mere force.* The only security known to the Law of Nations upon this subject, independent of all special covenant, is the right of personal visitation and search to be exercised by those who have an interest in making it." 3dly. Sir William Scott adduced authorities, which have been considered above, to shew that resistance to search is followed by the legal consequence of confiscation. (1)

A year after this decision had been given, a collision took place on the same question between Great Britain and Denmark. In the spring of 1800, a Danish frigate conveying merchantmen resisted the search of some British frigates near Gibraltar, and, the Danes having fired on our boats, our minister at Copenhagen demanded reparation of the Danish Court. Count Bernstorff, in reply, upheld the conduct of the Danish officer, and in

Difference on this subject between Great Britain and Denmark.

(1) See the case of the *Maria*, Rob. Rep. I. 340—378. In the above brief abstract of such of the judgment as affects the general

question of search, I have, as far as the abridgment would admit, used Sir W. Scott's own words.

a note of admirable ingenuity defended the position that Convoy exempts from search. Granting that usage and treaties undoubtedly allow to belligerents the right of searching merchant vessels not escorted by Convoy, he contended that the right of search being merely a conventional and not a natural right, its effect could not, without injustice, be arbitrarily extended beyond what consent or agreement had determined: now, no maritime power had, as far as he knew, ever acknowledged the right of visiting neutral ships escorted by Convoy, which they could not do without degrading their flag, and renouncing an essential part of their rights.

To this ingenious argument it may be replied, that it was false in fact, as the question *had* been discussed by one of the principal maritime powers of Europe, namely, as we have seen, by the Dutch, after the peace of 1654; and the decision had been in favour of allowing the search of vessels under Convoy. And with regard to the general rule of search not being applicable to cases of Convoy, it must be observed, that until 1780 the declarations of treaties, and the practice of Europe, had made search a general rule without any exception; that the parties who were introducing the new rule had done so by inserting in their treaties a clause hitherto unknown in treaties of navigation; and that they themselves gave evidence of the validity of the old rule, by the solicitude they displayed in their attempt to establish the novelty.

Count Bernstorff next contended that the right of search was based upon the necessity of ascertaining the country of merchant vessels, and of examining their papers: that if these papers were found in due form no ulterior search could legally take place: that, consequently, it was the authority of the government, in whose name these documents were signed, that procured

to a belligerent the required assurances. Now, a neutral government in causing her vessels to convoy merchantmen, offers to belligerents a much more positive and authentic guarantee than that which is usually taken as sufficient evidence; and suspicion of fraud could not attach without injurious reflection on the neutral country.

This position, which is widely different from that just noticed, is, I think, worthy of great attention. In the former position, Count Bernstorff contended that exemption from search by the presence of ships of war, *was* actually a right according to the Law of Nations; —in the latter argument he only gives reasons why such immunity *should be* granted in the case of Convoy; and in these reasons, I think, there is great weight: but one is a question of right, and the other of expediency. It was asserted, in favour of the latter position, that if the protection from Convoy were not conceded, it would involve the possibility that the most formidable fleet would not be allowed to protect the vessels under its Convoy from the search of the most petty cruiser. On the other hand it was said, that if this claim were allowed, any power that chose to do so, might, by the smallest cruiser, extend its protection over the whole commerce of the enemy, in all parts of the world. To this Count Bernstorff replied, that the government which degraded itself by lending its flag for such a fraud, would completely depart from the limits of neutrality, and would thereby justify unusual measures from the injured belligerent.

It seems then to me that neutral nations can by no means claim *as a right* that the presence of ships of war shall exempt merchantmen from search; but that, on the other hand, it is *desirable* that this exemption should be admitted by agreement, since adequate security can be

Freedom from search when under Convoy *desirable*, but *not a right*.

obtained as long as good faith is observed, and there is; at any rate, not more chance of fraud than under the other system; and it must be felt by all (by none would it be felt more keenly than by ourselves) that the search of merchant vessels, when the officer of a ship of war undertakes to affirm that there is no contraband on board, is a right replete with vexation and irksomeness, and is a custom which it is most desirable to modify, if a substitute can be found that offers an efficient guarantee against fraudulent evasion.

Case of the
"Freya."

Shortly after the date of the correspondence just referred to, a fresh collision occurred on the same question, between the same governments. On the 25th July, 1800, a Danish frigate, the *Freya*, charged with the Convoy of six merchantmen, was met in the channel by six British ships of war, and a demand was made to search the Convoy, which was refused by the Danish captain. One of the British frigates fired a gun at one of the merchantmen, and the Dane replied by firing a gun at the British frigate. The British commander renewed his demand to search, which was again refused by the Danish commander, who protested that there were no articles of contraband on board the merchantmen, and added, that he could not, in conformity with his instructions, suffer that any boat should proceed to board his Convoy. A boat was nevertheless dispatched on this service, and the Danish captain having fired at it, the British officer fired a broadside, and a short action ensued, which ended by the Dane surrendering to the British squadron, and being taken with his Convoy as prize to the Downs.

Correspondence on this
subject.

A correspondence ensued, in which both parties demanded reparation, the Danes, as having been attacked in time of peace, and having had a frigate and Convoy captured by an ally; and the British as having had force employed to obstruct a legal right, and having

had British subjects wantonly sacrificed in an unnecessary contest. In the following August, Lord Whitworth was sent on a special mission to the Court of Denmark, and a correspondence ensued between him and Count Bernstorff, in which neither party being able to obtain reparation from the other's Court, and Lord Whitworth threatening to leave Copenhagen in eight days if the matter were not previously settled, a convention was signed on the 29th August, 1800, in which a compromise was effected, each party abandoning something of their pretensions. It was agreed, by art. i., that the question of right relative to the search of neutral vessels under Convoy, should be referred to ulterior discussion. By art. ii., the Danish frigate and her Convoy were to be released, and the frigate to be repaired in the British ports. By art. iii., to prevent the renewal of contests of the same description, the king of Denmark was to suspend his Convoys until future negotiations should have effected a definitive convention. By art. iv., if similar contests should have occurred before instructions to prevent them had arrived, they should not be attended with any consequences, but should be regarded as settled by the present arrangement. By art. v., ratifications to be exchanged within three weeks.

Before this convention had been signed, or could be known, the Emperor Paul had issued a note dated 1st August, 1800, to the Courts of Sweden, Denmark, and Prussia, inviting them to join the Court of Russia in a new Armed Neutrality, and mentioning our conduct, in the case of the Danish Convoy, as making such a demonstration incumbent on the neutral powers. On the 29th August, an embargo was laid on British property in Russian ports. This was in clear and direct violation of the twelfth article of our treaties with Russia in 1766 and 1797, which expressly declared, that in case of rupture, the persons, ships, and commodities of

Conduct of
Russia.

the subjects of the contracting parties should not be detained or confiscated. (1) On our convention with Denmark becoming known at St. Petersburg, the embargo was taken off, in September; but in the November following an embargo was again laid on British vessels in Russian ports, on the ground of our retaining possession of Malta, of whose knights, it will be remembered, the Emperor Paul was Grand-Master. This measure, though not amounting to a commencement of hostilities, yet placed our relations with Russia in a state of equivocal amity, and a junction, at such a time, with such a power, for the purpose of resisting what we considered our undoubted maritime rights, was a measure of provocation certainly inconsistent with friendship, and perhaps with neutrality. The northern powers, however, were induced to become members of the proposed confederacy, of which the object was defined in five articles, the first four being similar to the four articles which embodied the principles of the Armed Neutrality of 1780, and the fifth article being a new one, engaging that the declaration of an officer in the navy, in the command of Convoy, that the merchantmen under his escort had no contraband on board, should suffice to prevent any visit from taking place either to his vessel or to the ships convoyed. Conventions to this effect were signed between Russia and Sweden on the 1st December, 1800; between Russia and Denmark on the same day; and between Russia and Prussia on the 1st December, 1800. (2)

British embargo.

On the 14th January, 1801, our government laid an embargo on all Russian, Danish, and Swedish vessels in British ports; stating as a reason that British subjects and British property had been in the same manner

(1) See De Martens, Rec. I. 396, and VI. 363.

(2) See the treaties in De Martens, Rec. VII. 172—194.

seized in Russia, and that while this was being done an alliance with the Court of St. Petersburg had been formed by the governments of Denmark and Sweden, of a nature hostile to the rights and interests of Great Britain.

A correspondence ensued between our government and those of Denmark and of Sweden, in which we asserted that we had always considered the confederacy of 1780 as of a hostile character, and that we could not otherwise regard the present alliance, framed for the same purpose of forcing us to abandon some of our most cherished maritime rights, an alliance formed with a government which had, during the correspondence, removed from a state of negative ill-will to a state of positive hostility.

Notes on this subject.

Shortly after, on the $\frac{1}{2}$ February, 1801, was issued an ukase by the Emperor Paul, prohibiting commerce between Russia and Prussia, on the ground that Russian goods so exported to Prussia were subsequently re-exported to Great Britain. Thus Prussia had no great reason to vaunt any increase of either respectability or advantage from her junction with the confederacy, being at once insulted and excluded by the leader in the alliance, for whom she had thought proper to neglect a friend of such tried constancy as Great Britain.

Trade between Prussia and Russia suspended.

In March, in the same year, measures of unequivocal hostility were resorted to by the courts of Berlin and Copenhagen; a Prussian force entered the electorate of Hanover, while a Danish force entered Hamburg, under the command of the Prince of Hesse, who issued a manifesto declaring that the arbitrary and violent measures resorted to by the British government, "in contempt of all the principles of the Law of Nations," had determined the neutral powers to recall our govern-

Prussian and Danish measures.

ment to juster sentiments; that the most efficacious method of attaining this end seemed to be by preventing all British commerce with the Elbe: that for this purpose the occupation of the free city of Hamburgh was absolutely necessary: that the King of Denmark had therefore given orders for such occupation by a Danish force; and that every care would be taken that the inhabitants should not be molested or disquieted by the troops under his command. As supplementary measures for the annoyance of our commerce, the buoys in the Elbe were taken up, and the lighthouse at Heligoland was disused.

Considerations
regarding
them.

These measures reflected no credit on their originators. It was a petty hostility to such a country as England to think of making us waive what we considered our undoubted maritime right, by the occupation of Hanover by Prussia; or by the stopping our commerce on a single river by Denmark, at a time when we were supreme on all the seas. Acts so incommensurate with their purpose weighed against their instigators, by denoting the presence of hatred but the absence of power. But the want of dignity was not the worst feature in the proceeding. The occupation of Hanover was perhaps suspicious, coming from a power whose commerce was too insignificant to make the protection of a small portion of that little advisable by a measure likely to entail war; while, on the other hand, the contiguity of the two States, and the desire to possess the electorate displayed both before and since, make the published reason for the occupation appear less like a cause than a pretext.

The occupa-
tion of Ham-
burgh.

But the occupation of Hamburgh was the most curious part of the proceedings, and was a sort of satire on the whole confederacy. If there be any single principle in the Law of Nations of indisputable truth, it is that

neutral States have the right of pursuing their customary trade with belligerents during war. The occupation of Hamburg by Denmark was, at best, an attempt to defend the Law of Nations by directly breaking through that law; it was an attempt to assert a doubtful principle by disregarding principles everywhere recognised; to vindicate a questionable right by the infliction of a certain wrong; and to enlarge the immunities of neutrals by a flagrant violation of neutrality.

On the 29th March, 1801, an embargo was laid on British property in Danish ports. This was a mere equivalent retaliation for our embargo on Danish property. The next day our fleet passed the Sound, and on the 2nd April occurred the battle of Copenhagen, when our victory laid the Danish capital at our mercy. An armistice was concluded, for the duration of which Denmark was, by art. II., to suspend her connection with the Armed Neutrality. As far, therefore, as this power was concerned, we forced an acquiescence in our limitation of neutrality.

Battle of
Copenhagen
in 1801.

About the same time the tyranny of Paul was terminated by one of those events which occasioned the witty definition of the Russian constitution as "*un despotisme limité par l'assassinat*." Alexander, immediately on his succession to his father, renewed the friendly intercourse between the Courts of London and St. Petersburg, and Prussia and Sweden soon after returned to their former relations of amity with this country.

Death of Paul.

A convention was signed between Russia and Great Britain on the $\frac{6}{17}$ June, 1801, (1) in which the principle of "free bottoms free goods" was abandoned by Russia,

Treaty be-
tween Great
Britain and
Russia.

(1) See De Martens, VII. 260.

while, on the other hand, the principle that the presence of ships of war should exempt the merchantmen which they convoyed from search was recognised by Great Britain. This treaty was acceded to by Denmark on the 23rd October, (1) and by Sweden on the 30th March, 1802. (2) The article with which we are at present concerned, art. IV., respecting Convoy, stated that : (3) The two high contracting parties desiring to prevent all cause of future dissension, by limiting the right of searching merchant vessels sailing with Convoy to those cases only in which the belligerent might be really prejudiced by the abuse of the neutral flag, have agreed, I. That the right of visiting merchant vessels belonging to the subjects of one of the contracting powers, and sailing under the Convoy of a ship of war of the said power, shall only be exercised by the ships of war of the belligerent party, and shall never be extended to privateers, cruisers, or other vessels not belonging to the Imperial or Royal Navy of their Majesties, but equipped by their subjects. II. That the proprietors of all merchant vessels belonging to the subjects of one of the contracting parties, and intended to sail under the Convoy of a ship of war, shall be obliged, before they receive their sailing orders, to produce to the commander of the Convoy their passports and certificates, or sea-letters, in the form annexed to the present treaty. III. That when such ship of war, having merchant vessels under Convoy, shall be met by a ship or ships of war of the other contracting party, being then in a state of war, to avoid all disorder the ships shall remain beyond cannon-shot distance, unless the state of the sea, or the place of meeting, render a nearer approach necessary; and the commander of the ships of the belligerent party shall send a boat to board the ship of

(1) See De Martens, VII. 273.

(3) *Id.* 263.(2) *Id.* 276.

the Convoy, when there shall take place a mutual verification of papers and passports, which ought to state, on one side, that the neutral ship of war is authorized to take under her escort such and such merchant vessels of her nation, laden with a specified cargo and proceeding to a specified port; and, on the other hand, stating that the ship of war of the belligerent belongs to the Imperial or Royal Navy of their Majesties. IV. This examination having been made, no further search shall take place if the papers are found to be regular and if there exists no valid ground for suspicion. In the contrary case, the commander of the neutral ship of war, having been duly required to do so by the commander of the ship or ships of the belligerent, shall bring to and detain his Convoy during the time necessary for the search of the vessels which compose it; and he shall have the power of naming and delegating one or more officers to assist in the search of the merchant vessels, which search shall take place in their presence on board each merchant ship, conjointly with one or more officers appointed by the commander of the ship of war of the belligerent power. V. Should it happen that the commander of the belligerent ship of war, having examined the papers found on board, and having questioned the master and crew of the vessel, shall perceive just and sufficient reasons for detaining a merchant ship, in order to proceed to a further examination, he shall notify this intention to the officer in command of the Convoy, who shall have the power of ordering an officer to remain on board the vessel so detained, and assist in the examination of the cause of her detention. The merchant vessel shall be immediately conducted to the nearest and most convenient port belonging to the belligerent party; and the further examination shall take place with all the despatch possible.

By the next article it is agreed that in case any merchant vessel so convoyed be detained without due and sufficient cause, the commander of the belligerent force shall be obliged not only to make good to the proprietors of the ship and cargo a full and perfect compensation for all losses, charges, damages and expenses, occasioned by such detention, but shall besides be liable to punishment for every act of violence or fraud committed, as the nature of the case may require. On the other hand, it shall not be permitted, on any pretext whatever, that the convoying ship shall oppose by force the detention of merchant vessels by the ships of war of the belligerent; but this obligation does not extend to the conduct of a ship of Convoy towards privateers. (1)

Considerations
on this treaty.

Such is a sketch of the circumstances under which this alteration was introduced, and ultimately recognised as part of their code of International Law by some of the first maritime powers of Europe. Strictly speaking, this exemption, not being part of the European Law of Nations as determined by usage, but being merely the result of convention between individual States, and an innovation of very modern origin, cannot be regarded as binding upon any governments except those which have engaged themselves by definite treaties on the subject. In the event of a war in which we were neutral, our vessels sailing with Convoy would be liable to the exercise of search as usual under the old system, with the commissioned vessels of all countries with which we had not contrary stipulations, and *vice versa*. Still the alteration in the rule is so much an improvement, uniting the advantage of avoiding occasions of

(1) For the original treaties of convoy, see De Martens, Rec. and correspondence on the subject VII. 127—281.

dispute with that of obtaining a more satisfactory guarantee of belligerent rights, that it seems desirable that the clause should be embodied in all treaties of navigation. Even without such engagements, belligerents might, in most cases, instruct their cruisers, with advantage, to act on the spirit of such exemption; but there are also cases in which this could not safely be done. In such conjunctures I imagine that the determination of the belligerent is final; as I regard the exemption from search by the presence of ships of war to be still, by the European Law of Nations, when not limited by particular engagement, not a right which a neutral can claim, but a favour which a belligerent is at full liberty either to grant or to withhold.

An interesting discussion on the principle of Convoy occurred in the last war, on a dispute between the United States and Denmark. We have seen that resistance to search by a *neutral*, confiscates his vessel and cargo. On the other hand, resistance to search by an *enemy* does not entail the confiscation of the neutral goods on board his vessel; (1) the latter resistance violates no duty on the part of the captain, who is right to get away if he can. In 1810 the Danish government issued an ordinance condemning as lawful prize "such vessels as, notwithstanding their flag is considered neutral, as well with regard to Great Britain as the powers at war with the same nation, still, either in the Atlantic or Baltic, have made use of English Convoy." Several American vessels were captured, and, with their cargoes, condemned for offending against this ordinance. The minister of the United States contended that such confiscations were unjust; that the rule laid down by Denmark was an innovation unsupported by any precedent; that the cargoes of the vessels cap-

Case regarding
Convoy be-
tween the
United States
and Denmark.

(1) See Rob. Rep. V. 232, *The Catherina Elisabetha*.

tured were of an innocent nature; and that the joining the British convoy was intended, not to withdraw them from the search of the Danes, but to avoid the being subjected to the decisions of the French prize courts. These latter circumstances would induce a prize court to regard with all possible lenity of construction the case of such captures; but, as to the principle, I think that the Danish ordinance was in perfect conformity with the Law of Nations. In this opinion I find I am at issue with Dr. Wheaton, who has given an excellent statement of the American positions in the discussion. He has, however, but very slightly noticed the strong positions of the Danish government; and I hope he will pardon my thinking that he has treated this part of his subject more as an advocate than as a judge. He is, however, an author with whom it would always give me more satisfaction to find that I coincide than that I disagree. In the particular case above stated there may have been hardship; but, as far as principle goes, had the case been different, and had the American ships, instead of having innocent cargoes on board, been laden with contraband of war, or with the property of enemies of Denmark, they might, by the escort of the British convoy, have avoided the detention of Danish cruisers of smaller force, and have thus defeated the clear rights of Denmark. As a general principle, I think that the sailing under the convoy of a belligerent must be regarded as a withdrawal from the search of the other belligerent, as a resistance to his rights, and as entailing confiscation as a consequence of such attempted evasion. The correspondence between Denmark and the United States did not issue in any decision, a sum being paid, *en bloc*, to liquidate all American claims, with a declaration that it could never be invoked as a precedent by either party. (1)

(1) See the remarks on the subject in Mr. Wheaton's Elements of International Law (Dana's Edition), p. 708.

Hitherto we have been considering the question of Search of ships of war. searching *merchant* vessels. During the war with the first Napoleon the right of searching *ships of war* was called into consideration between this country and the United States. A considerable number of our seamen had gone on board American vessels, where the similarity of manners and language, joined to the larger amount of pay, offered a great temptation to our men, and both ships of war and merchant vessels belonging to the United States were partly manned by British sailors. With regard to merchant vessels, the right of taking our men from them is a matter of little doubt, and is not likely to lead to much dispute. The King of England has the power of issuing proclamation forbidding mariners to enter foreign service, when the state of the country requires it, and such proclamations have been frequently issued in times of war, and those who disobey are guilty of misdemeanor, and may, upon conviction, be fined and imprisoned. (1) We have a full right to take such of our subjects as are found by us during the lawful exercise of our right of search; but with men of war the right of search has never been recognised, nor till the war with Napoleon I. had it been proposed for discussion, except in two instances. (2) After our war with Holland in 1652, in which the Dutch were several times defeated and their commerce nearly ruined, England demanded, in 1653, that all vessels should submit to be visited if thereto required. This was peremptorily refused by Holland. Beaten as they were, the Dutch would not submit to this pretension. Shortly after, on the discussion regarding Convoy above alluded to, the States General expressly ordered that their officers of commissioned vessels should

(1) Opinion of Attorney General Macdonald, in 1788. See Chalmers' Opinions of Eminent Lawyers, &c., II. 254-257.

(2) See the article on the right of search in the Edinburgh Review for October, 1807.

by no means permit that they be searched, nor deliver, nor suffer to be taken out of their ships, any people or property. I am not aware of any instance when this subject was agitated between this period, when the decisions were against the search of ships of war, and the time of our collision with America on this question.

Collision between Great Britain and America on this subject.

The similarity of language and manner which made it difficult to detect our seamen among an American crew led to many instances of hardship, in which Americans were seized as English and made to serve on board British vessels. We can imagine the feelings of the Americans on this occasion by fancying what would be our own excitement, if a squadron of American ships of war were to cruise in the Channel, and, intercepting our outward and homeward bound vessels, to impress British subjects as American, and force them on board their ships of war. The grievance had for some time been complained of, and had attained a considerable height, when, early in 1806, a bill was brought before Congress declaring that our compelling American subjects to serve on board British ships of war was a violation of the treaty between the two nations, making such impressment piracy and felony, and encouraging resistance on the part of American seamen. While men's minds were in this inflamed state, an accident occurred which brought their agitation to the utmost pitch. While performing the duties of search and impressment off New York, a shot from the *Leander* frigate accidentally struck and killed John Pearce, an American seaman. The greatest ferment ensued on this unfortunate circumstance. The body of the seaman was paraded before an immense number of spectators. An indictment for wilful murder was found against the British captain, and a reward was offered for his apprehension by a proclamation from the Presi-

dent. Provisions which had been purchased for the crew of the *Leander* were seized and paraded through the streets of New York, and afterwards sold for the benefit of the poor.

Plenipotentiaries were sent from America to England, to attempt to settle these disputes, and a treaty was signed, on the 31st December, 1806; but before it had been ratified by the President a fresh collision occurred between the two countries. In 1807, while a British squadron under Admiral Berkeley was stationed in the Chesapeake, an American frigate, the *Chesapeake*, was fitting out for the Mediterranean, and several of our seamen deserted our squadron, and went on board the *Chesapeake*. These men had been publicly paraded through the streets of Norfolk, even in the sight of British officers, under the protection of an American recruiting party. Representations were made to the agents of the American government, but they were not attended with any effect. The *Leopard* frigate was consequently ordered by our admiral to cruise off the cape, and meet the *Chesapeake* as soon as she had passed the limits which respect for a neutral territory rendered an unlawful space for hostile engagement. Accordingly the captain of the *Leopard* sent a boat on board the *Chesapeake* to state that there were deserters on board, and that he was ordered to search for them. This being refused, he fired a few shots without injuring the American, and no attention being paid to these, he fired two broadsides, and the American struck. Five or six deserters were found on board, and these being taken, the *Chesapeake* was dismissed to her port with the loss of six killed and twenty-one wounded. As might have been expected, great ferment took place in America on this event. The President issued a proclamation, in which the aggression was violently denounced, and was said to be aggravated in character by the fact

Affair between
the "*Leopard*"
and the
"*Chesapeake*."

that the men were, after all, American citizens; and all armed British vessels were ordered forthwith to quit American harbours, and forbidden to re-enter them. In England great regret was expressed for this collision: the ministers declared their willingness to make reparation: Admiral Berkeley was recalled from the station: and in a proclamation issued for recalling British seamen from foreign service, a distinction was made between ships of war and those of commerce: with the latter force might be used to obtain deserters, but with the former a requisition was to be made for the delivery of deserters, and, on this being refused, information was to be forwarded to the British government, or to our ministers at neutral courts.

**Subsequent
measures.**

Shortly after, Mr. Rose was despatched on a special mission to the United States; and, in the words of the King's Speech in 1808, "for an unauthorized act of force committed against an American ship of war, his Majesty did not hesitate to offer immediate and spontaneous reparation." But other questions connected with navigation prevented the settlement of this dispute, which our readiness to make concession might have otherwise amicably compromised. The severities on neutral commerce consequent on the Berlin and Milan decrees, and on our own Orders in Council, were then pressing heavily on the Americans, and the government of the United States was desirous of obtaining an abatement of this grievance at the same time. On this subject our government refused to rescind its instructions; and, as we have seen in the chapter on Blockade, the differences between the governments issued in the non-intercourse act, and subsequently in open war. (1)

(1) For the fact of the above Registers for 1806, 1807, and collision and disputes with the 1808.
United States, see the Annual

The treaty of Ghent, which restored peace, did not include any settlement of this question. Negotiations took place at a subsequent period, of which the American minister, Mr. Rush, has published some interesting particulars. Articles were proposed, not only on impressment, but upon blockade, contraband, trade with a belligerent's colonies, prize courts, and letters of marque; in fact, on all the great questions of navigation; and the rights of neutrals were to have been settled by this treaty, of which, however, the negotiations were broken off, nominally on technical grounds. It was agreed between the negotiators that formal lists of American and British seamen should be made out, which lists should serve to determine the nationality of a seaman in any disputed case. By the 4th article, the British gave up the right of impressment on the seas, and it was desired, on our part, that all seamen who were to be considered American were to have been naturalized before the *signature* of the treaty; the American minister desired the limitation to be the *ratification* of the treaty; and on this trifling difference did the negotiations terminate in 1818. Lord Castlereagh, who had managed the commencement of the negotiations, had been at the Congress of Aix-la-Chapelle during their later progress, and it is just to the memory of that minister to record Mr. Rush's statement, that "he was not able to divest himself of the impression, that had Lord Castlereagh been in London there would not have been a failure." (1)

Negotiations
on this ques-
tion after the
war.

Should negotiations ever be resumed on this subject, it is probable that a recognition will take place, that the impressment of men, at any rate from ships of war, cannot be exercised. If such a right exists at all, it exists

Considerations
on this subject.

(1) Rush's Narrative of a Residence at the Court of London, p. 376.

without regard to disparity of power to enforce it, and the smallest cruiser of the United States has a right to board our first-rates, and take away seamen supposed to be American. How we are likely to bear this, it is not necessary to state. The evil is twofold; first, in the exercise of the right of search as applied to ships of war at all; and next, as to the hardships arising from mistaking Americans for Englishmen, and the reverse, and thus obliging foreigners to serve and fight for a country to which they do not belong. An instance is given by Jefferson, in which two nephews of Washington were, by mistake, impressed by the English as they were returning from Europe, and placed "as common seamen under the ordinary discipline of ships of war." (1) I have no means of ascertaining the particulars of this case, but it seems an example of the greatest grievance to which subjects of a neutral power can be subjected, amounting to the loss of liberty and risk of life, exercised upon the relations of a man whose name was identified with the most glorious recollections of Americans, and with the very existence of their country as an independent nation.*

Right of search
for slaves in
certain lati-
tudes.

One more observation on the subject of search remains. The right of search is obviously a war right, there being no power in the vessels of a government to search merchantmen in time of peace. This right may, however, like any other privilege, be mutually granted by treaty between any powers. Such privilege has been established in the single case of searching vessels cruising in certain latitudes, to ascertain whether they have slaves on board. By art. v. of our treaty with Portugal, of 28th July,

(1) Jefferson's Memoirs and Correspondence, IV. 190—195.

[* For a list of documents relative to this subject, see Dana's note to Wheaton (Part II. ch. II.).]

1817, it is provided, that for the prevention of all illicit traffic in slaves on the part of their respective subjects, the contracting powers mutually consent that the ships of war of their Royal Navies, which shall be provided with special instructions for this purpose, may visit such merchant vessels of the two nations as may be suspected, upon reasonable grounds, of having slaves on board acquired by an illicit traffic. This privilege of search is to be exclusively exercised by ships of war, and only by such of the latter as shall receive special instructions for the purpose, and an indemnity for unjust detention is to be paid by the government of an offending cruiser. (1) A similar stipulation is made by art. IX. of our treaty with Spain, dated 23rd September, 1817; (2) also by arts. II. III. IV. of our treaty with the Netherlands, of 4th May, 1818, by which it is likewise agreed, that in case of convoy, the officer in command of the convoy shall proceed together with the officer of the searching vessel, and that the former shall grant every facility in the search and eventual detention of the vessels so visited. (3) Stipulations in the same spirit, but slightly different in form, make arts. II. III. and v. of our treaty with Sweden, in 1824, (4) and of several more recent treaties of which I have not copies.*

On this mutual concession, and sacrifice of a jealous pride, in the cause of humanity, I cannot do better than quote the fine expressions used by Sir James Mackintosh : Observations of Sir James Mackintosh on this subject.

(1) De Martens, Supp. VIII. 444.

(2) *Id.* VII. 188.

(3) *Id.* VIII. 512—514.

(4) *Id.* X. part II. 623—628.

[* See especially the Treaty of Washington between England and the United States, signed April 7, 1862.]

"For himself, he felt a pride in the British flag being, for this object alone, subjected to search by foreign ships.
 * * * * * It had now risen to loftier honour by bending to the cause of justice and humanity. That which had braved the mighty now lowered itself to the feeble and defenceless—to those, who, far from being able to make us any return, would never hear of what we had done for them, and probably were ignorant of our name." (1)*

(1) Mackintosh's Life by his son, II. 393, 394.

[* The strict limitation of the right of search to time of war, except so far as it is extended for special purposes by treaty, was settled by the case of the *Le Louis* (Dodson's Adm. Rep. II. p. 210), in which Sir W. Scott's admirably lucid judgment should, for England, at least, have set the question for ever at rest. The judgment contains an exhaustive exposition of the principles upon which the whole right in question is grounded. As to the alleged claim to exercise the right in time of peace in order to suppress the slave trade, Sir W. Scott says: "To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; to force the way to the liberation of Africa by trampling on the independence of other States in Europe; in short, to procure an eminent good by means that are unlawful; is as little consonant to private morality as to public justice. Obtain the concurrence of other nations, if you can, by application, by remonstrance, by example, by every peaceable instrument which man can employ to attract the consent of man. But a nation is not justified in assuming rights that do not belong to her, merely because she means to apply them to a

[“laudable purpose, nor in setting out upon a moral “crusade of converting other nations by acts of unlawful force.”

It is the more important to recur to this memorable judgment as England has not been always content to abide by the limits it imposes. For instance, in reference to this very matter of suppressing the slave trade, Lord Aberdeen, in 1841, in a despatch to Mr. Stevenson, the American minister, claimed a right of visiting vessels suspected of being engaged in the slave trade, in order to ascertain whether they were, as their flag denoted, really American vessels or not; and in 1858, owing to the action of British cruisers employed in suppressing the slave trade in the Gulf of Mexico, a long correspondence ensued between the governments of England and the United States, the result of which was that Lord Malmesbury, on the 26th of July, 1858, announced in the House of Lords, that “on receiving the unanimous “opinion of the law officers of the crown, her Majesty’s “government at once acted, and we frankly confessed “that we had no legal claim to the right of visit and “of search, which has hitherto been assumed.” Lord Lyndhurst, on the same occasion, in answer to the charge that the government had surrendered a most valuable and important right, said, “we have surrendered no right at all; for, in point of fact, no such “right as that contended for has ever existed. We “have, my lords, abandoned that *assumption* of right, “and, in doing so, I think that we have acted justly, “prudently, and wisely.” See Halleck, ch. XXV. and a note in Dr. Abdy’s edition of Kent, ch. IX., in which the learned Editor gives the instructions issued in 1859 to commanders of British cruisers in conformity with principles accepted by the French government, for the purpose of regulating the mode in which the nationality of ships sailing under the French flag is to be tested.

[The penalty for resisting search is "confiscation of the property so withheld from visitation and search" (see Sir W. Scott in *The Maria*, 1 Rob. Ad. Rep. 340); but neutral property on board is not confiscated merely because of the resistance of an enemy's merchant vessel. (See *The Catherina Elizabeth*, 5 Rob. Ad. Rep. 232.)—ED.]

CHAPTER XII.

OF CAPTURES MADE IN NEUTRAL TERRITORY, AND OF
PRIZES BROUGHT INTO NEUTRAL PORTS.

THE right of Neutral States to an immunity from the violence of Belligerents, excepting the cases which have been considered in the preceding chapters, establishes as one of the most obvious rules of the Law of Nations, that no hostile operations can be committed in a neutral territory. Not only in the actual territory, but in the ports and harbours of a neutral State, and at such a distance from the shore as the custom of nations admits as under the jurisdiction of the State, are all acts of violence expressly forbidden by the Law of Nations. What the distance from the shore is, which is allowed as within the jurisdiction of a State, was considered in a former chapter;* it being sufficient to state here that a sea league, or three miles, is the distance that is usually so understood. If, therefore, any prizes are made by belligerents in the ports, or harbours, or otherwise within the jurisdiction of a neutral State, such prizes have been illegally captured, and restitution must be made to the original owners. This obviously just regulation is admitted by all writers whatever, and it has been invariably followed by all States, even in rude periods, there being a treaty between Edward IV. and Louis XI., in 1471, in which this principle is recognised, (1) and it has been since mentioned in instances too numerous to recapitulate.

No captures
allowable with-
in neutral
jurisdiction.

(1) Dumont, Corps Dip. III. i. 524.

[* See Book III. Ch. III. p. 120.]

Opinion of
Bynkershoek
considered.

The only opinion in the least at variance with this principle is that of Bynkershoek, who, admitting the general validity of the rule, thinks that in cases where a vessel has been chased by a cruiser within neutral jurisdiction, she may be captured there, *dum fervet opus*, if it can be done without injury to the neutral State. (1) But he himself allows that he does not find his opinion supported by other writers, or admitted by any State except the Dutch; and I cannot find that his exception has been ever appealed to since his time, or that any exception whatever is allowed against the strict maintenance of the principle that all captures whatever are illegal, if made within neutral jurisdiction, and that restitution must be made accordingly. (2)

Not only im-
mediate, but
proximate,
hostile acts,
within neutral
jurisdiction,
forbidden.

This principle is indeed so generally acknowledged, that prizes made by vessels cruising off and on near a neutral port have been restored by our courts: and it has been usual with many neutral States to issue regulations, that when a ship belonging to one belligerent has left a neutral port, no vessel belonging to the other belligerent shall be allowed to leave that port till after an interval of twenty-four hours. Thus not only *immediate*, but *proximate*, acts of hostility, committed under neutral jurisdiction, are forbidden by the Positive Law of Nations. (3)

(1) Bynk. Quest. Jur. Pub. lib. I. c. VIII.

(2) See an interesting correspondence on this subject, in which this principle was enforced by the United States, in Jefferson's Correspondence, III. 243 *et seq.* By a treaty between England and the United Provinces, in 1654, if the ships of either party were taken by an enemy in the port of the other, being neutral, the latter

engaged to pursue and oblige the captor to restore his prize. A similar engagement was made by the treaty of 1669, between England and Denmark, with the clause that such pursuit was to be at the expense of the captured ship. See Dumont, Corps Dip. VI. I. 129, and VI. II. 76.

(3) See Moeser, Versuch, X. 294 *et seq.*

But though the law is so explicit on the subject of making captures within neutral jurisdiction, yet there is no authority in neutral States to release the goods or vessels of a friend, when they are brought to her ports by that friend's antagonist in war. On this subject the principles discussed in a previous chapter hold good, (1) namely, that it is the duty of neutrals to abstain from all interference whatever, *except* in those cases where special treaty intervenes; and in these latter cases, a deviation from the strict principle of equal treatment is allowed without an abandonment of neutrality.

Neutral States do not interfere with prizes brought into their ports, unless from special treaty.

Formerly, by the regulations of most States, captors were not allowed to take their prizes into any ports but those of their own State. By a proclamation of Henry VI. in 1426, it was ordered that all prizes were to be brought into British ports; and a similar regulation was issued by Elizabeth, in 1602. Captors were desired to bring French prizes into the ports of France by various ordinances in 1400, in 1543, in 1674, and in 1689,—the ordinance of 1705 was the first that allowed French prizes to be taken into the ports of an ally. And by the Danish ordinance of 1710, it was forbidden, on pain of death, to carry Danish prizes into any but Danish ports. (2) But such rules were not universal, and I find Loccenius, who wrote in 1651; considering this subject, and deciding that prizes in neutral ports could not be interfered with unless special treaty intervened. (3) Since that time the custom of carrying prizes into the ports of an ally has been frequently resorted to, and it is the invariable opinion, even of those most jealous of the privileges of neutrals, that a neutral state has no power of interfering with prizes

Formerly prizes were forbidden to be carried to neutral ports.

(1) See Book III. ch. I.

(3) Loccenius, de Jure Mari-

(2) See Robinson's Collectanea Maritima, p. 30 *et seq.*

timo, lib. II. c. IV. § 7.

brought to her ports, unless through the operation of special treaty. (1)

Treaties re-
garding prizes
in neutral
ports.

But special treaties have intervened, in a very great number of instances, to alter the common rule of non-interference. As early as 1406, I find a treaty between Henry IV. and the Duke of Burgundy, which stipulates that no rovers, or other "*gens labourans sur la guerre*," as they are quaintly called, should be allowed to issue from the ports of either party to prey upon the commerce of the other, and that no prizes made by such parties should be landed or sold in the dominions of either, and that if they were landed or sold, restitution should be made to the original proprietors. (2) This clause was renewed in a treaty between England and Burgundy in 1467, and was inserted in the treaty between England and Brittany in 1468. (3) By the French ordinance of 1650, no prizes brought into French ports by foreign cruisers were to be sold there. (4) And by subsequent French ordinances, no prize taken by a vessel with a foreign commission was to be allowed to remain more than twenty-four hours in a French port, unless compelled by stress of weather, or unless the prize had been taken from the enemies of the French; and *also* any goods belonging to the French, or to their allies, were to be taken out of any prizes brought into French ports, and restored to the original proprietors. (5) By a treaty between England and Portugal, in 1654, prizes from either party brought by their enemies into the ports of the other ally, were to be restored to the original owners. (6) A similar agreement was made in

(1) See Hübner de la Saisie des Bâtimens Neutres, II. i. ch. II. § 8, and also De Martens, liv. VIII. ch. VII. § 312.

(2) Dumont, Corps Dip. II. i. 303, 304.

(3) *Id.* III. i. 594 and 598.

(4) Valin, II. 219.

(5) *Id.* Ord. de la Marine, liv. III. tit. IX. arts. XIV. XV.

(6) Dumont, Corps Dip. VI. II. 84.

the treaty between the United Provinces and Portugal, in 1661. (1) By treaties between France and Algiers, in 1764, and France and Tunis, in 1765, Morocco corsairs were not to be allowed to sell prizes made from the French in either regency. (2) By a treaty between France and the United States, in 1778, no cruiser of a power at war with either party, was to be allowed to sell her prizes, or discharge her cargo, in the ports of either ally, nor even to buy more provisions than were indispensable to carry her to the nearest port. (3) But by the Venetian edict of 1779, respecting the neutrality of Venice, the sale of prizes, and even equipment of cruisers, is equally allowed to all belligerents. (4) And the United States and United Provinces, in 1782, agreed to allow to each other the sale of any prizes brought by either party into the ports of the other. (5) But by treaty between Great Britain and the Emperor, in 1795, not only were any prizes made from either ally forbidden to be sold in the ports of the other, but they were not to be allowed to remain in such ports for more than twenty-four hours, under penalty of confiscation, and all subjects of either ally brought in as prisoners were to be released. (6) By a treaty between the United States and Algiers, in 1795, no prize made upon the Americans by the Barbary powers was to be allowed to be sold at Algiers, while, on the other hand, any vessel of the United States was to be allowed to sell her prizes at Algiers: (7) this article was renewed in 1815 and in 1816. (8) By a treaty between France and Portugal, in 1797, no prize made from either party was to be sold

(1) Dumont, Corps Dip. VI.
II. 369.

(2) De Martens, Rec. Supp. III.
70, 71.

(3) De Martens, Rec. II. 597.

(4) *Id.* III. 85.

(5) *Id.* 465.

(6) *Id.* VI. 82.

(7) *Id.* 137.

(8) *Id.* Supp. VI. 600, and IX.

12. Similar articles are found in treaties, in 1799, between Spain and Morocco, and between Portugal and Tripoli, *id.* Rec. VI. 599, 627.

in the ports of the other, and no privateers to be received except in case of imminent peril. (1) By treaty between France and the United States, in 1800, no sale of prizes from either ally is to be allowed in the ports of the other, nor are privateers to be allowed to purchase more provisions than are indispensable to take them to the next friendly port. (2) But by a treaty between Great Britain and the Sicilies, in 1808, no prizes made *from* the British were to be allowed to enter Sicilian ports, while, on the other hand, prizes made *by* the British were to be allowed to be sold there. (3)

No usage
deducible from
the practice of
States on this
subject.

Thus there has been nothing like consistency, or uniformity of practice, in the engagements of States on the subject of prizes in neutral ports. The practice of different States has been too various to admit of any *usage* being deduced from their enactments: and the question therefore remains to be decided according to the general principles of neutrality, which declare that, where no antecedent treaty intervenes, an exact similarity of conduct must be observed towards both belligerents.

[The case of the *Virginus*, carrying the flag of the United States, which was captured by a Spanish war-steamer on October 31st, 1873, on the ground of its attempting to land on the coast of Cuba a party of insurrectionists against the Spanish Government, brought into relief some difficult questions as to the right of interference with ships on the high seas. It was proved that the *Virginus* was not legally a vessel of the United States, and that the real owners were Spaniards. The case attracted a good deal of attention, owing to the cruel harshness with which the crew were treated, a large number (including marines and cabin-boys) being

(1) De Martens, Rec. VI. 414.

(3) *Id.* Supp. VIII. 16.

(2) *Id.* VII. 108.

executed within a few days of the capture. Mr. Woolsey, who gives a full report of the circumstances of the case and of the controversy to which it gave rise, in the 3rd Appendix to the fourth edition of his work, says that the following rules of international law are illustrated by the case of the *Virginus*:—

1. That the right of self-defence authorizes a nation to visit and capture a vessel as “well on the high seas” as in its own waters, when there is reasonable ground “to believe it to be engaged in a hostile expedition against the territory of such nation.”

2. That a nation’s right of jurisdiction “on the high seas over vessels owned by its citizens and subjects, authorizes the detention and capture of a vessel found on the high seas, which, upon reasonable ground, is believed to be owned by its citizens or subjects, and to be engaged in violating its laws. The flag or register of another nation, if not properly belonging to a vessel, does not render its detention unlawful by the cruiser of a nation to which its owners belong. As, however, the register affords *prima facie* evidence of nationality, the nation which gave the register by mistake must be treated with great care; detention on grounds proved to be erroneous must be atoned for, and the question of ownership would naturally be committed, where the evidence is not patent, to a third party.”

It would be more exact to say, that the case of the *Virginus* is an authority in favour of the validity of these propositions, especially as assented to by the United States and Spain. The opinion of Mr. Woolsey himself also carries with it all the weight due to a learned commentator, who is also a citizen of one of the States directly concerned.—ED.]

CHAPTER XIII.

PRIZE COURTS.

Prize courts
different in
different
countries.

QUESTIONS of maritime capture are adjudged by courts specially constituted for that purpose. The form of these courts is different in different countries, but in all they are distinct from the municipal tribunals of the country, and are commissioned to decide according to the Law of Nations, including the engagements of treaties where any such exist. (1)

Their constitution in Great Britain.

In this country the exclusive jurisdiction of maritime captures belongs to our Courts of Admiralty and Vice-Admiralty. Courts of Admiralty were first established in England in the reign of Edward III., and their powers were limited by Richard II., who first conferred the title of Admiral of England on a subject, by patent to the Earl of Arundel and Surrey. (2) The Court of Admiralty is held before the Lord High Admiral, or his deputy, who is called judge of the Court of Admiralty. "Anciently, he had jurisdiction of all causes of merchants and mariners, happening not only upon the main sea, but in all foreign parts, within the king's dominions and without them, and was to judge them in a summary way, according to the laws of Oleron and others." (3) Various limitations of this jurisdiction

(1) For the former jurisdiction of prizes in the United Provinces, see Bynk. Quest. Jur. Pub. I. xviii. For the establishment and various alterations of the French

Prize Courts, see Valin, liv. III. tit. IX. art. XXI.

(2) Beawes, *Lex Mercatoria*, p. 248 (ed. 1752).

(3) *Id.*

have since been made, especially by 28 Hen. VIII. c. 15, by which marine felonies are to be tried by grand and petty jury, according to the law of the land, instead of, as before, leaving the life of a man dependent on the opinion of a single judge. (1) The proceedings of our Court of Admiralty, "are according to the methods of the civil law, like those of the ecclesiastical courts, upon which account it is usually held at the same place with the spiritual courts. It is no Court of Record any more than the spiritual courts." (2) *

The jurisdiction of maritime captures by the courts of the captor has never, I believe, been disputed, except in the single instance of the Prussian Memorial in 1752, in which the question was doubtfully mentioned, and when the reply was given that such jurisdiction was in strict conformity with the Law of Nations, and that such was the manner in which prizes had constantly been adjudged in all the countries of Europe as well as in England. (3)

Jurisdiction of prize courts in the captor's country universally acknowledged.

In several treaties this jurisdiction is spoken of and its exercise defined. In our treaties it is frequently declared that all questions of prize shall be adjudged according to the rules of equity, by persons above suspicion, and having no interest in the controversy; and that if the ambassadors on either side complain of an unjust sentence, the cause shall be reheard and examined by the King in Council, and if redress shall appear due, it shall be given within three months' time. Such stipulations are found in our treaty, still in force, with

Treaties on this subject.

(1) Stephen's Blackstone, Book V. ch. v.

(2) *Id.* III. 68.

(3) Compare Ch. De Martens, *Causes Célèbres*, II. p. 34 *et seq.* and p. 68.

Denmark in 1670, arts. xxxvi. and xxxvii.; (1) in our commercial treaty with France, at Utrecht, in 1713, arts. xxx. and xxxi.; (2) in the same renewed at Aix-la-Chapelle, in 1748, art. iii.; (3) in the treaty of Paris, in 1763, art. ii.; (4) by treaty of Versailles, in 1783, art. ii.; (5) and by the commercial treaty of 1786, arts. xxxv. and xxxvi. (6) A similar engagement, that appeals shall be heard by the English Privy Council, is found in our treaty with the United Provinces, in 1668, arts. xv. and xvi.; (7) in the same renewed by arts. xi. and xii. of the treaty of 1674. (8) A similar engagement, for the revision of prize causes by the council of the King of France, occurs in the treaty between France and Hamburg, in 1769, art. xxxvii. (9)

**Prize courts in
neutral
countries.**

The practice of European prize courts usually requires that a prize shall be carried for adjudication either into a port of the captor's country or into the port of an ally. During the last war with France, the French Government, in 1796, decreed that the French consuls and vice-consuls, in neutral territory, should have jurisdiction in cases of prizes brought into the ports where they were stationed. (10) This jurisdiction was disallowed in our Court of Admiralty, in the case of the *Flad Oyen*, a British prize taken into Bergen, and sold under condemnation from the French consul there. Sir William Scott said, "that it was for the very first time in the world that in the year 1799, an attempt was made to impose upon the court a sentence of a tribunal not existing in the belligerent country, but of a person pretending to be authorized within the dominions of a

(1) Chalmers, I. 95.

(2) *Id.* 408.

(3) *Id.* 428.

(4) *Id.* 470.

(5) *Id.* 497.

(6) *Id.* 538.

(7) *Id.* 167.

(8) *Id.* 184.

(9) De Martens, Rec. I. 647.

(10) *Id.* V. 387.

neutral country;" that it had been the constant usage that the tribunals of the Law of Nations in these matters shall exercise their functions within the belligerent country;" and that "before the present war no sentence of this kind had ever been produced in the annals of mankind, and that it was produced by one nation only in this war."(1) I am only acquainted with one exception to this rule, and that is made by the treaty of 1789, between Denmark and Genoa, which declares, art. XIII., that "if one of the contracting powers should be at war with a third power, the other contracting power, which has remained neutral, shall have the option, in virtue of art. IV. of the treaty, to permit or to refuse that, in his ports, his Courts of Admiralty shall or shall not adjudge the prizes which are, respectively, made by the belligerent powers."(2) This treaty does not appear to have been known to Sir William Scott, or to the advocates on either side in the judgment on the *Flad Oyen*; or, although it might not have affected the case of the *Flad Oyen*, (which was not strictly in point, as the above treaty speaks of neutral tribunals, while the *Flad Oyen* was the case of a belligerent tribunal in a neutral country,) yet it might have modified Sir William Scott's assertion of its "having been the constant usage that the tribunals of the Law of Nations, in these matters, shall exercise their functions within the belligerent country."(3) The exception was made by two countries of great weight in maritime questions, and at a time when one of them was under the control of a statesman to whom the greatest deference is owing on all questions of maritime jurisprudence, namely Count Bernstorff. Still the usual method of deciding prize cases is by

(1) Rob. Rep. I. 136 *et seq.*

(3) Rob. Rep. I. 141.

(2) De Martens, Rec. IV. 448.

judgment in the courts of the captor's government, or in that of an ally or co-belligerent. (1)

Prizes in a neutral port may be adjudicated in the belligerent country.

Although our courts do not admit the validity of decisions delivered in neutral countries, yet they permit adjudications to take place of prizes made by British captors, when such prizes are not in the ports of our own country, but are in the ports of some neutral state.* Sir William Scott considered that this was not correct in principle, but that we were concluded by our own inveterate practice; and that we must extend to other countries the latitude of construction which we admitted in our own case. It is to be remarked, that the case in which this decision was given, was one in which this principle was admitted in the prize courts, not of Holland it is true, but of the Batavian Republic. (2)

Sentence of a prize court necessary to transfer property in a prize.

Sentence of condemnation by a prize court is, at the present day, considered necessary to complete the transfer of maritime prizes from the original owner to the captor. Formerly, to have taken captured property *infra præsidia*, to have conveyed it into the captor's ports, or into the midst of his fleet, or to have had it in undisputed possession for twenty-four hours, was deemed sufficient to constitute prizes the property of the captors. (3) The doctrine that condemnation is now required, is confirmed by De Martens and by Lampredi, (4) and is laid down by Sir William Scott, "it not being thought fit, in civi-

(1) See the notes, Rob. Rep. I. 141, 142. See also Klüber, Droit des Gens, part II. tit. II. § 295, 296.

(2) The *Henrick* and *Maria*, Rob. Rep. IV. 43—63.

(3) See Grotius de Jure, lib. III. cap. VI. § 3. Vattel, liv. III. ch. XIII. § 196.

(4) Précis du Droit des Gens, liv. III. ch. VII. § 322. Commerce des Neutres, § XIII.

[* See next chapter.]

lized society, that property of this sort should be converted without the sentence of a competent court.” (1) The same rule has been adopted by the Supreme Court of the United States. (2)

But, though condemnation by a lawful prize court is final as affecting the transfer of captured property from one individual to another, yet, in cases of unjust decision, the question may be re-opened between the governments of the parties concerned, and reparation demanded when injustice has been sustained. In the case of Prussia, in 1752, the British government paid an indemnity to the Prussian government, for cases in which injustice had been sustained by the decisions of our tribunals. In the treaty of 1795, between Great Britain and the United States, a mixed commission was appointed by art. VII. (3) to decide American claims arising from captures by British cruisers; and to indemnify the individuals who might have sustained loss “by reason of irregular or illegal captures or *condemnations* of their vessels, or other property;” and also to compensate such loss of British property as had arisen from captures made in waters under the jurisdiction of the United States. The British commissioners, at first, objected to reconsider cases that had been decided by our Admiralty, but this was overruled, and indemnity was given in cases in which there had been a final sentence of condemnation. A similar indemnity has been allowed by the Danish government to the United States on the same principle. (4)* And the recent

In case of unjust decisions the question may be re-opened by the government of the injured party.

(1) Rob. Rep. IV. 55.

(4) Wheaton's Elements, II. 95.

(2) Wheaton's Elem. II. 91.

—111.

(3) De Martens, Rec. V. 656.

[* Mr. Halleck (p. 765) quotes the language used by the American government on this occasion, which puts in a strong light the sole ground and meaning of re-opening questions decided by a prize triba-

dispute between the United States and France, regarded money which was partly an indemnity for unjust condemnations of American property.* The rule of reopening the decisions of prize courts is thus fully established; and it is a beneficial principle, as conveying an additional guarantee that neutral subjects,

nal. "The demand which the United States made upon the Danish government was not made for a judicial reversal of the sentences pronounced by its tribunals, but for the indemnity to which the American citizens were entitled, in consequence of the denial of justice by the tribunal in the last resort, and of the responsibility thus incurred by the Danish government for the acts of its cruisers and tribunal. The Danish government was, of course, free to adopt any measures it might think proper to satisfy itself of the injustice of those sentences, one of the most natural of which would be a re-examination and discussion of the cases complained of, conducted by an impartial tribunal, under the sanction of the two governments, not for the purpose of disturbing the question of title to the specific property which had been irrevocably condemned, or of reviving the controversy between the individual captors and claimants which had been for ever terminated, but for the purpose of determining between government and government whether injustice had been done by the tribunals of one power against the citizens of the other, and of determining what indemnity ought to be granted to the latter." Mr. Halleck adds that "there are many other instances where arrangements of this kind have been made between States for determining and settling claims which arise from the unjust condemnation of prize tribunals."—ED.]

[* This dispute originated in an alleged reluctance on the part of France, in 1836, to pay the indemnity covenanted to be paid by a convention entered into between the United States and France, on the 4th of July, 1831. The first article of this convention declared the object of the French government in agreeing to pay the indemnity therein stipulated to be "to liberate itself completely from all the reclamations preferred against it by citizens of the United States for unlawful seizures, captures, sequestrations, confiscations, or destruction of their vessels, cargoes or other property." The result of the dispute of 1836 was that England offered her mediation, which was accepted, but became unnecessary, as France complied with the demands of the United States. See Lawrence's *Wheaton* (sixth edition), p. 617; Dana's *Wheaton* (eighth edition), p. 120, and Russell's *Modern Europe*, Vol. IV. p. 736.—ED.]

while innocent, shall not suffer from the conduct of belligerents.*

[* For the history and true limits of the jurisdiction of the English High Court of Admiralty in prize cases, see Lord Mansfield's judgment in *Lindo v. Rodney and another*, cited in a note to *Le Caux v. Eden*, Douglas' Reports, vol. ii. p. 594. His lordship distinguishes the functions of the judge of the court under his general commission and those under a special commission issued only in time of war. This distinction gives rise to the two aspects of the Court of Admiralty, that of an "instance" court and that of a "prize" court. "The manner of proceeding," says Lord Mansfield, "is totally different. The whole system of litigation and jurisdiction in the prize court is peculiar to itself; it is no more like the Court of Admiralty than it is to any court in Westminster Hall." By the "Naval Prize Act of 1864," which recited that it was expedient to enact permanently, with amendments, such provisions concerning naval prize and matters connected therewith as have heretofore been usually passed at the "beginning of a war," the High Court of Admiralty has jurisdiction given it throughout her Majesty's dominions as a prize court, and an appeal is given to the Judicial Committee of the Privy Council.

The true functions of a prize court are curtly expressed by Lord Mansfield in the course of the judgment above referred to. "The end of a prize court is, to suspend the property till condemnation; to punish every sort of misbehaviour in the captives; to restore instantly, *velis levatis* (as the books express it, and as I have often heard Dr. Paul quote), if, upon the most summary examination, there don't appear sufficient ground; to condemn finally, if the goods really are prize, against everybody, giving everybody a fair

[“ opportunity of being heard. A captor may and must
 “ force every person interested to defend, and every
 “ person interested may force him to proceed to con-
 “ demn without delay.”

The dignity and international character of a prize court are expressed in the following extracts from judgments of Lord Stowell's:—

“ It is to be recollected that this is a court of the Law
 “ of Nations, though sitting here under the authority
 “ of the king of Great Britain. It belongs to other
 “ nations as well as to our own ; and what foreigners
 “ have a right to demand from it is the administration
 “ of the Law of Nations, simply and exclusively of the
 “ introduction of principles borrowed from our own
 “ municipal jurisprudence, to which it is well known
 “ they have at all times expressed no inconsiderable
 “ reluctance.” (*The Recovery*, 6 Rob. Adm. Rep. 348.)

“ In forming my judgment, I trust that it has not
 “ for a moment escaped my anxious recollection what
 “ it is that the duty of my station calls from me, namely,
 “ not to deliver occasional and shifting opinions to
 “ serve present purposes of particular national interests,
 “ but to administer with indifference that justice which
 “ the Law of Nations holds out without distinction to
 “ independent States, some happening to be neutral
 “ and some belligerent ; the seat of judicial authority
 “ is indeed locally here, in the belligerent country,
 “ according to the known law and practice of nations ;
 “ but the law itself has no locality.” (*The Maria Paulsen*, 1 Rob. Adm. Rep. 348 ; *Tudor's Leading Cases*, 757.)

Sir R. Phillimore (Vol. III. Part XI. ch. III.) gives at length an interesting and important letter addressed in 1794 by Sir W. Scott and Sir J. Nicholl to Mr. Jay, the American ambassador, for the purpose of explaining the principles and practice of British courts of prize.

[The following extracts from this letter may be given for the purpose of explaining from a most authoritative source the general character of the procedure pursued :—

“ By the maritime Law of Nations, universally and
 “ immemorially received, there is an established method
 “ of determination whether the capture be; or be not,
 “ lawful prize. Before the ship, or goods, can be dis-
 “ posed of by the captors, there must be a regular
 “ judicial proceeding, wherein both parties may be
 “ heard; and condemnation therefore, as prize, in a
 “ Court of Admiralty, judging by the Law of Nations
 “ and treaties. The proper and regular court for these
 “ condemnations is the court of that State to whom the
 “ captor belongs. The evidence to acquit or condemn,
 “ with or without costs or damages, must, in the first
 “ instance, come merely from the ship taken, viz., the
 “ papers on board, and the examination on oath of the
 “ master and other principal officers; for which purpose
 “ there are officers of Admiralty in all the considerable
 “ seaports of every maritime power at war, to examine
 “ the captains, and other principal officers of every ship
 “ brought in as a prize, upon general and impartial
 “ interrogatories. If there do not appear from thence
 “ grounds to condemn as enemies’ property or con-
 “ traband goods going to the enemy, there must be an
 “ acquittal, unless, from the aforesaid evidence, the
 “ property shall appear so doubtful that it is reasonable
 “ to go into farther proof thereof. A claim of ship, or
 “ goods, must be supported by the oath of somebody, at
 “ least as to belief. The Law of Nations requires good
 “ faith. Therefore, every ship must be provided with
 “ complete and genuine papers; and the master at
 “ least should be privy to the truth of the transaction.
 “ To enforce these rules, if there be false or colourable
 “ papers; if any papers be thrown overboard; if the
 “ master and officers examined *in preparatorio* grossly
 “ prevaricate; if proper ship’s papers are not on board;

M.

I I

[“ or if the master and crew cannot say whether the ship or cargo be the property of a friend or enemy, the Law of Nations allows, according to the degrees of misbehaviour or suspicion, arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received, by the claimant, in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages.”

The Naval Prize Act of 1864 (27 & 28 Vict. c. xxv.) provides,—in close, but not exact, accordance with the previously existing practice,—that (1) the captor shall bring the ship's papers into the registry of the court within the jurisdiction of which the ship captured is brought; (2) the officer in command or one of the chief officers of the capturing ship shall make oath that they are brought in as they were taken without fraud or the like; (3) the captor shall bring three or four of the principal persons belonging to the captured ship before the judge of the court or some person authorized in this behalf, “by whom they shall be examined on oath on the standing interrogatories;” (4) on the affidavit as to the ship's papers being filed, a *monition* shall issue, returnable within twenty days, calling all persons in general to shew cause why the captured ship should not be condemned; (5) on the return of the “monition,” the court shall, “on production of the preparatory examinations and ship's papers, proceed with all convenient speed either to condemn or to release the captured ship;” (6) “where, on production of the preparatory examinations and ship's papers, it appears to the court doubtful whether the captured ship is good prize or not, the court may direct *further proof* to be adduced, either by affidavit or by examination of witnesses, with or without pleadings, or by production of further documents; and on such further proof being adduced, the court shall with all con-

["venient speed proceed to adjudication." The procedure and practice of the British High Court of Admiralty with respect to penalties, estimation of damages, allowance of freight and of costs, will be found given in careful detail in Sir R. Phillimore's third volume. In the same volume will also be found a general account of the Courts of Prize existing in other countries.—ED.]

CHAPTER XIV.

OF THE PROBABILITY OF AN IMPROVED OBSERVANCE
OF INTERNATIONAL JUSTICE.

Plans for
securing the
observance of
the Law of
Nations; that
of Leibnitz.

STILL it cannot be denied that there is a want of certainty with regard to the Law of Nations as compared with the decisions of municipal law; and various plans have been suggested, by different authors, for the remedy of this defect; but all hitherto advanced have been unfit for practical application. Some reference has been already made to the plan of Leibnitz, who desired that the Pope and the Emperor, whom he represents as the spiritual and temporal heads of the Christian commonwealth, should have authority over the other potentates of Europe. He proposed that some permanent council should be established by these two sovereigns, to act as a tribunal for the judgment of disputed cases of treaty, and other international questions, and to settle all contested points by peaceful adjustment. (1) But this scheme, even in the time of Leibnitz, could only have been congenial to the minds of those who were at once loyal Germans and devout Catholics; and, at the present day, its faultiness is hardly worth consideration, as it is rendered impracticable by the formal dissolution of the empire, and by the loss of all temporal authority by the Pope. Whatever might formerly have been the pretensions of the Pope and the Emperor, whose dignity Leibnitz greatly extols, they certainly never could claim as a right such jurisdiction over independent States, and the tribunal proposed would have been of too suspected

(1) *Leibniti Opera* (1768), iv. 330, 331.

a character to be the object of voluntary recognition by the other European sovereigns.

During the prevalence of the love of discussing elementary principles, which the French revolution elicited, the Abbé Grégoire proposed to the National Convention, in April, 1795, a series of declarations of the rights of States. His propositions partook of the general nature of such schemes at that period,—they were dangerous when they ceased to be common-place. Thus as long as he confined himself to such remarks as, Art. 21, "Treaties between States are sacred and inviolable;"—Art. 10, "Every nation is mistress of its own territory;"—Art. 3, "A nation should act towards others as she desires that others should act towards her," he only asserted harmless truisms; but when he proceeded to declare, Art. 5, that "The individual interest of a nation is subordinate to the general interest of the human family," either the position was equally a truism, or he made a way for the entrance of the most pernicious fallacy in political morality, that of discovering the standard of right in the present advantage of the numerical majority, a confusion that would annihilate the rights of small States, and justify the destruction of any nation by a confederacy of many nations. The Abbé Grégoire's scheme would have been liable to Burke's criticism on the *Declaration of the Rights of Man*, "that institute and digest of anarchy;" but it was not adopted even by the Convention, who would have found, in propositions that are to us stale truisms, that which was opposed to their system of tyrannizing under the name of liberty, and of conquering under the guise of fraternization. (1)

Scheme of the
Abbé Grégoire.

I have already remarked that Kant proposed to remedy the want of an authoritative tribunal to decide questions

Plan of Kant
and of Mill.

(1) See some good remarks on the Abbé Grégoire's plan in De Martens, *Précis du Droit des Gens*, preface to the edition of 1796.

on the Law of Nations, by the constitution of a "permanent States'-Congress," formed of delegates from the various States of Europe. A similar proposition was advanced by Mr. James Mill, in his *Essay on the Law of Nations*, reprinted from the *Encyclopædia Britannica*. Mr. Mill proposed that delegates should be sent from different governments for the purpose of framing a code of the Law of Nations; and that, after the formation of such a code, there should be an "international tribunal," to take cognizance of all disputes between nations. This tribunal he would have composed of delegates from the different governments of "the more civilized and leading nations of the world;" and, as experience proves that "a numerous assembly of men cannot form a good judicatory," when any case came for decision, the delegates should "choose some one individual of their body upon whom the whole duty of judge should in that case devolve," the delegates being present during the proceedings. A court of judicature being thus established, if a nation against which any accusation was brought refused to plead, or to submit to the tribunal, the inquiry should proceed notwithstanding; and "the fact of not appearing should itself be treated as an offence against the Law of Nations." Finally, "refractory nations" should be punished by the ceremonial being turned against them, or by individual subjects of these States being deprived of the power of suing in foreign courts except for the greater crimes. "The intention should never be entertained of supporting the decisions of the international tribunal by force of arms."

The latter scheme considered.

This scheme is so visionary, for many reasons, that nothing but the name of its author renders its mention necessary. With regard to the formation of a code, the "delegates" who are to be appointed for that purpose must, of course, decide all questions by a majority of votes, otherwise their functions would lead to no result.

Now, as the military powers far outnumber the naval powers, it is obvious that the peculiar rights of maritime States would be sacrificed by such a body. But, supposing this and other objections to the formation of a code to be overcome, no one, who has looked into history, can imagine that delegates from different States could be obtained, for the "international tribunal," who would really consider the questions that came before them merely as matters of right; every disputed point would be a nucleus for intrigue. Such a body of "delegates" would unite the faults of the manœuvring of a college of cardinals, and of the tardiness and procrastination of an old German diet. But the last and principal objection is, that such an assembly would endanger the liberty of nations. Let any one consider what would be the condition of Europe when any single State was predominant: what, for instance, would have become of the independence of the European States, if such an assembly had been sitting in 1806; England would, of course, have been voted "out of the map of Europe." But objections and difficulties occur on every side to oppose a scheme which seems to possess only one merit, that of having been suggested by benevolent intentions.

In the Armed Neutrality of 1780, the northern powers inserted, as one of the articles of their confederacy, that as soon as peace should be restored, the allies "should take the most efficacious measures, with the maritime powers in general, to obtain, for all maritime wars which may in future arise, the recognition and acknowledgment of the system of neutrality, and the principles, established by the present convention, serving to form the basis of a universal maritime code." (1)

A system proposed by the Armed Neutrality.

(1) See treaty between Russia and Denmark, Art. v. De Martens, Rec. III. 197. See the same

scheme recognised by Sweden, *id.* 239, and by Prussia, *id.* 251.

But never
organized.

But no such negotiation for a "universal maritime code" ever ensued, and so far from the northern powers attempting to obtain the recognition of their principles by other maritime States, the leader in this celebrated confederacy, Russia, violated these principles in a war with Sweden, another member of the confederacy, on the very first occasion that presented itself. The Armed Neutrality was not indeed a confederacy for the support of principles, as such, but it was a selfish alliance with high-sounding declarations, and history has exhibited its members as supporting one set of principles when they were neutrals, and another set of principles when they became belligerents.

Holy Alliance.

Besides this confederacy of the Armed Neutrality, there has been one other league of sovereigns, having for its stated purpose a great influence on the intercourse of States. I allude to that celebrated convention, termed the "Holy Alliance," signed by the monarchs of Austria, Prussia, and Russia, at Paris, the 14-26th September 1815. The nature of this compact, which has been so often referred to, has been so little understood, and its consequences are so exactly in point with respect to any action of universal compacts upon the Law of Nations, that the insertion of the whole treaty may be desirable, especially as it is very short.

Nature of the
convention.

"Their majesties the Emperor of Austria, the King of Prussia, and the Emperor of Russia, as a consequence of the great events which have signalized, in Europe, the course of the last three years, and principally of the benefits which it has pleased Divine Providence to spread over the States whose governments have placed their trust and their hope in Him alone, having acquired the complete conviction that it is necessary to base the system to be adopted by States in their mutual relations

upon the sublime truths taught by the eternal religion of the Holy Saviour;

“Declare solemnly, that the present instrument *has only for its object* to manifest before all the world their invincible determination to take for their rule of conduct, whether in the administration of their respective States, or in their political relations with other governments, none but the precepts of that holy religion, precepts of justice, of charity, and of peace; which, far from being applicable only to private life, ought, on the contrary, to have a direct influence on the resolves of princes, and to guide all their steps, as being the sole method of strengthening human institutions and remedying their imperfections. In consequence, their majesties have agreed to the following articles:—

“Art. I. Conformably to the words of the Holy Scriptures, which command all men to look upon each other as brethren, the three contracting monarchs will remain united by the bonds of a real and indissoluble brotherhood; and, considering themselves as members of one country (*compatriotes*), they will afford each other, on every occasion and in every place, assistance, aid, and succour: looking upon themselves, with regard to their subjects and their armies, as fathers of a family, they will govern them in that spirit of brotherhood with which they are animated for the protection of religion, peace, and justice.

“Art. II. In consequence, the only principle in force, whether between the said sovereigns or between their subjects, shall be that of reciprocally doing each other good, (*se rendre réciproquement service*); of testifying, by unalterable good-will, the mutual affection with which they ought to be animated; of considering all men only as members of the same Christian nation, the three allied

princes only regarding themselves as delegated by Providence to govern three branches of the same family, namely, Austria, Prussia, and Russia: confessing thus that the Christian nation, of which they and their people are a part, has in reality no other sovereign than He to whom power properly belongs, because in Him alone are found the treasures of love, of knowledge, and of infinite wisdom, that is to say, God, our Divine Saviour Jesus Christ, the Word of the most High, the Word of Life. Their majesties recommend in consequence to their people, with the most tender solicitude, as the sole method of enjoying that peace which arises from a good conscience, and which alone is durable, to strengthen themselves more and more each day in those principles, and in the exercise of those duties which the Divine Saviour has taught mankind.

“Art. III. All those powers that may desire to make a solemn avowal of the sacred principles which have dictated the present act, and that will acknowledge how important it is to the happiness of nations, too long disturbed, that these truths shall henceforth exercise on human destiny all the influence which is their due, shall be received with equal earnestness and affection into this Holy Alliance.”(1)

Remark of
Pufendorf on
such alliances.

With regard to the principle of such an alliance as this, there is a passage in Pufendorf which is exactly applicable: “It seems,” he says, “useless to frame pacts or leagues, barely for the support of universal peace. For, by such a league, nothing is superadded to the obligations of natural law, and no agreement is made for the performance of any thing to which the parties

(1) De Martens, *Rec. des Traités*, Supp. vi. 656. In consequence of the invitation in the last article, the Holy Alliance was joined, in

1816 and 1817, by the Netherlands, Saxony, Wurtemberg, Switzerland, and the Hanse-Towns. See *id.* p. 659.

were not previously bound by the law of nature itself, nor is the obligation rendered more stringent by such a compact. * * * * * And hence it is contrary to the practice of civilized men to enter into such a compact, of which the articles and conditions provide nothing more than that neither shall immediately violate that which has been already expressly commanded by nature. And it appears irreverent towards God, as if His command did not lay a sufficiently complete obligation upon us, unless we besides gave our consent ; or as if the obligation depended upon our own opinion. * * * * * Thus, if any one engage to serve another, he does not expressly and particularly state among the terms of the agreement, that he will not act treacherously towards him, or that he will not be guilty of robbery: and, for the same reason, *that* convention is dishonourable in which one party binds himself to nothing more than that he will not violate the general peace; that is, that he will not use, with regard to the other, the rights which we are accustomed to exercise towards the brutes." (1)

But the Holy Alliance is a little removed from the censures of Pufendorf, by this reason, that during the period preceding that convention there had been, in the predominant power of Europe, such an abandonment of all principle, and such a reckless disregard—apparently the hardihood of ignorance—of all the responsibilities which the Christian religion, or which any religion, holds up to the perpetrators of the mighty crimes which signalize that period of history, that it might be con-

Reply to this objection.

(1) Pufendorf de Jure Nat. et Gent. lib. II. c. II. § 11. For the application of this passage of Pufendorf to the Holy Alliance, I am indebted to Mr. Webster's speech in Congress on the Greek

Revolution, delivered 19th January, 1823. See Speeches, I. 240—264. The whole speech, like everything I have seen of Mr. Webster's, is full of noble thoughts and statesmanlike views.

sidered not irrelevant or improper to call back men's minds, at the conclusion of that terrible period, to the true basis of human action, which the French Revolution had caused to be so frequently forgotten, alike in the conduct of individuals and in the intercourse of nations.

Probable good
faith of the
contracting
parties.

Besides this, there is another observation that I would make regarding this celebrated convention. It has now become identified with a set of principles which the sovereigns who framed that alliance afterwards thought proper to pursue, and those principles I join with others in believing to be such as no confederacy of sovereigns has a right to maintain in their treatment of other independent States. But I do not believe that any such interpretation of this treaty was intended, or thought of, at the time of its formation. I am no general believer in the pure designs or disinterested intentions of cabinets; but the history of Europe, at that period, has given me the firm conviction that at the time when the Holy Alliance was framed the parties to that treaty were really animated by the noble views of which that instrument is a declaration. We islanders, living in the only European kingdom which was not the theatre of active warfare, and possessing almost the only capital that was not violated by the presence of a victorious enemy, can hardly enter into the feelings of the inhabitants of continental States, at the conclusion of that subjection to French tyranny, which was effected by what they well term "the war of liberation." Every history of that period records the enthusiasm which pervaded all classes, and the disinterestedness and heroism which were elicited in all States; and I believe that among the continental powers, sovereigns again independent on their thrones, and their subjects once more free from a foreign yoke, were alike in a state of generous excitement; and, with the feelings which

animate men of whatever nature when some imminent danger has been averted, they were animated with sincere thankfulness, and were eager in their anticipations of a regenerated future. I believe it to have been in such a state of feeling that the continental sovereigns promised to their subjects unusual privileges of representation, and that the parties to the Holy Alliance framed that instrument, and published it, as a manifesto of what were really their intentions.

I dwell at such length upon this celebrated alliance, because I regard it as most exactly in point on the subject now under consideration, namely, the influence which any confederacy of States is likely to have in promoting an improved observance of the Law of Nations. Neither the plans of Leibnitz, nor of Kant, nor of Mill, were so likely to succeed, as was this voluntary confederacy of some of the chief European sovereigns, for the maintenance of the true principles of international justice. It was a confederacy made at the commencement of a new era in Europe, when the miseries resulting from a violation of international justice were fresh in every recollection. And what have been the results, as contrasted with the purposes declared by the Holy Alliance? A few improvements in the old system were shortly afterwards made at Vienna; as those regarding the slave-trade, the free navigation of rivers, and the rules for precedence which should prevent the unseemly disputes of ambassadors. But, with regard to any general effect upon the European system, the Holy Alliance has merely given occasion to a number of itinerant congresses, having for their purpose an interference in the political constitutions and domestic concerns of independent States; and its name has justly become identified, not with the furtherance of international justice, but with the forcible propagation of a particular set of political opinions. The Holy Alliance

Unfavourable results of that alliance.

was professedly formed for the support of the true principles of the Law of Nations; but, in the manner in which it has been carried out, its members have violated that law by their gratuitous interference with independent States. This descent from the profession of noble principles to the pursuit of questionable purposes may not have taken by surprise those who are accustomed to diplomatic history; but the issue of this alliance proves, it may be feared, that it is not to any confederacy of sovereigns that we may look for an improved observance of international justice. It is not likely that the state of Europe will again present so favourable an opportunity for the development of a better system; nor is there anything to warrant the belief, that, were similar circumstances to recur, there would be a better construction of moral professions than has been given in the results of the Holy Alliance.

Codification.

A principal reason why no general code of the Law of Nations should ever be formed by a confederacy of States is, that treaties can only bind the contracting parties, and cannot oblige other independent States to conform to their provisions. Now the interests of some of the European governments are so different from those of others as to render any general agreement very improbable. In questions of neutral commerce, the interests of the smaller States are directly opposed to the interests of the great maritime powers, nor is there any chance of a voluntary resignation by either party of their peculiar claims. But the advantages of codification are, after all, problematical, and separate treaties between individual States, ascertaining debated points of the Law of Nations, have most of the advantages of a general code, and are perhaps more likely to be observed with faithfulness. (1)

(1) In Von Savigny's essay *the Vocation of our Age to Jurisprudence*, there are some excellent

But, although it may be doubted whether any permanent good will ever result from international codes, or from general confederacies, are we therefore to despond as to any improvement in the observance of justice between nations? It is a question difficult to solve, and one which will be differently answered, according to individual temperament and experience, but I trust that there is good ground for confidence in amelioration. It must be confessed that improvement in morality, though favourably affected by education, has by no means kept pace with the advance of physical invention, or with general civilization; and this remark applies equally to the morality of individuals and of nations. By a comparison between distant periods, an inference favourable to improvement seems probable from the contrast. We could not now tolerate the political profligacy of Charles the Second's time, nor would his ambitious career of aggression be now permitted to Louis XIV. And yet, the names of Venice, Genoa, and Poland, present recollections too recent to allow much congratulation on the advance of a self-denying justice.

Chances of improved observance of international justice.

The wars consequent upon the French Revolution may not properly be adduced as evidence against the advance of international justice, for the events of that period were merely an exception, although a terrible one, to the course of European history. They arose from power being suddenly given to a class utterly unfitted for its exercise, and no more illustrate the general state of European morality than the acts of madmen exemplify the condition of the sane. That Revolution has prejudiced the cause of liberty, because the evils of license have given a hold to the impugnors of freedom.

No inference from the French Revolution.

remarks on the advantages and disadvantages of codification, which, although peculiarly intended for municipal law, are equally appli-

cable to the Law of Nations. [See for recent experiments in the codification of the Law of Nations, p. 54.—ED.]

But it has not injured the cause of morals, for its results were a *reductio ad absurdum* of the fantastic theories then rife, and each terror of the Revolution is a proof of the importance of morality.

Effect of
popular in-
fluence.

The direct action which the people are now exercising on all political questions, in this and in several other countries, must be felt in the future intercourse of States in their international relations. We have not now to consider whether this was *à priori* desirable, as a *fact* political control has passed into the hands of the people, and the only question now is, how that power is to be exercised. Any inference drawn from the history of democratic influence, either in ancient or modern times, must be inconclusive, from the difference of circumstances, especially of education and intelligence in the people exercising authority. In our own mixed constitution, the degree of popular interference which existed previous to the Reform Bill, however admirable, or the reverse, on other departments of government, was not of a beneficial tendency as regarded the foreign policy of this country. Owing to the struggles of party, the foreign secretaries, and consequently the foreign policy of this country, became the subjects of perpetual change; no dependence was to be placed on our government persevering in the same policy, and the remark made by De Witt to Sir William Temple, has frequently held good since, that "from the time of Elizabeth there had been nothing but a continual fluctuation in the conduct of England, with whom no one could concert measures for two years consecutively." (1) The lover of constitutional government had to view with regret, that the foreign administration of his own country was an inferior instrument, as far as accomplishing its purposes went, to the favouritism which existed in

(1) Courtenay's Life of Sir W. Temple, I. 160.

absolute governments, where the perseverance in one uniform system gave effect, such as we could never rely upon obtaining, to the policy of a Richelieu or an Olivarez. The want of acquaintance, on the part of the people, with questions of foreign politics, prevented their exercising a wholesome influence on that department of administration, while our foreign policy was being continually altered, owing to the ministerial changes consequent upon a popular form of government.

During the protectorate of Cromwell, the foreign policy of this country was admirably conducted; but this was not owing to the supremacy of Republican principles, but to the vigour and efficiency of the government, which was greater than that exercised by any administration between the time of Elizabeth and that of Lord Chatham. The same may be said of the administration of the United States during the last war. Many of the American diplomatic notes, especially those written by Jefferson, are admirable state-papers, but they are the result, not of a system, but of the "happy accident" of having individual ministers endowed with peculiar capacity.

Instances of
other popular
governments.

But there are many things in which a popular form of government is far superior to a government not responsible to the people, even in international relations. Many such topics are at once obvious, and some will be separately mentioned as we proceed. And for the rest, it is to the advance of enlightenment that we must look for the remedy of what may be objectionable in the administration of international politics among representative governments. Not that the constituencies at large are likely to be fit judges on the intricate points of the Law of Nations; but, if the subject is well attended to among those who influence public opinion, correct

Many ad-
vantages from
representative
government.

principles will gradually be diffused among the people. Correct conclusions must often be the result of long study, but when research has once ascertained the truth, although the proofs cannot be gone through by the people, yet they will take the truth upon trust from the agreement and character of the expounders, as they do the truths of chemistry and astronomy, which they believe, although they have never scrutinised the demonstration. (1)

Conclusion.

With the wish that this treatise may be in some measure instrumental to this result, I conclude this chapter, of which the latter part is longer than I intended; but the time is hardly mis-spent that is given to the consideration of the means, or the probabilities, of human improvement.*

(1) This illustration is borrowed from Mr. Austin, who has some excellent remarks on the probable advance of ethical science, in his third Lecture.

[* The experience of the time which has elapsed since the appearance of the first edition of this work, and especially since the passing of the Representation of the People Act of 1867, does not seem to call for any important modification in the remarks made at the close of the present chapter on the effect of the introduction of popular institutions on the progress of the Law of Nations. It may perhaps be noted that the House of Commons have of late shewn themselves more ready, and even eager, to discuss questions of foreign politics and the Law of Nations than heretofore, especially where commercial claims or the possibility of war has been involved. Among causes which have tended to produce this change may be enumerated the progressive assimilation of political institutions on constitutional bases throughout Europe, the vastly increased cheapness and facility of foreign travel, the general study of foreign

[languages, and the dissemination of principles of free trade. These influences have tended at once to make more apparent the common interests that the people of all States have in the maintenance of peace, and to bring about a spontaneous concert for that end. As a special expression of this growing tendency may be counted Mr. Ryland's motion in the House of Commons, on Friday, February 14th, 1873, "That, in the opinion of the House, the commercial treaty recently negotiated with France, and all future treaties between this country and foreign powers, ought to be laid upon the table of both Houses of Parliament before being ratified, in order that an opportunity may be afforded to both Houses of expressing their opinion upon the provisions of such treaties before ratification."

Mr. Richard, again, may be said to have created an era in the progress of the claims of popular representative bodies to interpose in foreign affairs by his motion in the House of Commons, on July 8th, 1873, "That an humble address be presented to her Majesty praying that she will be graciously pleased to direct her principal Secretary of State for Foreign Affairs to enter into communication with foreign powers with a view to the further improvement of International Law, and the establishment of a general and permanent system of international arbitration." The motion was opposed by the whole strength of the government of the day, solely on the ground that it was premature: Mr. Gladstone, the Prime Minister, saying that "he saw great value in the motion of his honorable friend; but he was convinced that this question, for a long time to come, would only make practical progress by a steady adherence on the part of those powers who were rightly inclined and convinced and persuaded on the subject to the principle, —first, of governing themselves by justice and moderation, and next of losing no opportunity of recom-

[“mending the peaceful settlement of disputes between “nations.” After an important debate, the motion was carried against the government by a majority of ten.

On the 24th of November in the same year (1873) a similar motion was introduced by Signor Mancini into the Italian Chamber of Deputies, and the terms of the motion are so moderate and carefully weighed that they merit particular attention. They are as follows:—

“The Chamber trusts that his Majesty’s Government will endeavour, in their relations with Foreign Powers, to render Arbitration an acceptable and frequent mode of solving, according to the dictates of equity, such international questions as may admit of that mode of arrangement, as well as to introduce opportunely, into any Treaties with those Powers, a clause to the effect that any difference of opinion respecting the interpretation and execution of those Treaties is to be referred to arbitrators, and to promote conventions between Italy and other civilised nations of a nature to render uniform and obligatory, in the interest of the respective peoples, the essential rules of Private International Right.”

The minister for foreign affairs, Signor Visconte-Venosta, speaking on behalf of the government, cordially accepted the resolution, and when the motion was put to the vote it was unanimously carried. Similar resolutions have subsequently been adopted by the House of Representatives of the United States on June 17th, 1874, and since then by the Senate; by the Second Chamber of the Swedish Diet on March 21st, 1874; by the Second Chamber of the States-General of the Netherlands in December, 1874; and by the Belgian Senate and Chamber of Representatives (both houses being assemblies directly representing the people); the subject has also been brought in the course of the present year before the Parliaments of Canada and of Denmark.

[This summary of facts illustrating the growing concern felt by popular representative bodies in the devising of measures towards the substitution of legal controversy in the place of war, may be closed by some brief extracts from a paper of the Editor on the obstacles to the general adoption of the practice of Arbitration in the present circumstances of the States of Europe and America, prepared for the International Conference for the Reform and Codification of International Law held at Geneva in September, 1874.

“It is never to be forgotten that the States of Europe have only recently begun to emerge from the chaotic confusion in which the religious and dynastic or (so to speak) diplomatic wars of the sixteenth and seventeenth centuries enveloped them. The present is eminently a century of revolutions—with all the vacillations of strength and influence, the half-formed and scarcely-conscious aspirations, the fluctuating and incalculable policy, which ever-changing internal political conditions imply.

“Again, each State is closely entangled in the meshes of its own past acts, traditions, and policy. It is generally hampered or, at least, restricted in its freedom by treaty obligations which are of the most varied sorts, and which have often been imposed under circumstances the reverse of those which now exist. As popular institutions progress (and, in spite of some indications to the contrary, they are progressing everywhere), a conflict of internal policy is constantly discernible between executive governments in persistent pursuit of long-sighted ends, and popular assemblies eager to understand, to master, and to discuss every diplomatic movement. Any real or even apparent harmony in continuous action, extending over a long term of years, is becoming more and more impossible, and to that extent it is to be feared that, until the internal elements of all States have

[“organized themselves afresh, the future conduct of any one State can be less and less confidently relied upon.

“Such being the actual and undeniable condition of the facts, it is not surprising that the construction of a satisfactory Court of Arbitration for the solution of any but the simplest problems seems at present almost hopeless. It can only become matter of reasonable practical interest when the above obstacles are removed. Thus every measure which helps gradually to remove these obstacles helps, to that extent, to facilitate the introduction of a general system of arbitration. As the equality of States—that is, the equality of moral value, and of the power of making precious spiritual and economical, if not dynamical, contributions to the whole—becomes not merely a legal formula, but an irrefutable fact; as States and their populations come to hate war, and sincerely to desire peace; as the government of each State comes more adequately to represent the population; and as the population grows to be better informed, more far-sighted, more awake to their true interests, and less swayed by sudden gusts of passion and prejudice; then, and not till then, will a genuine confidence in the impartiality of arbitrators become as familiar as it is now almost inconceivable.

* * * *

“Every measure that tends at once to create, to organize, to refine, and to fortify a right sentiment of public opinion in Europe, tends so far to induce States to abate unjust pretensions, to be calm and self-restrained in their manifestations of injured feeling, and to be ready, at every possible point, to be content to substitute legal claims and processes for demands and proceedings to the satisfaction and conduct of which mere logic ceases to be applicable.

“It is not necessary here to dwell upon the present aspects of International Law. That body of law is,

[“ indisputably, very far removed as yet from having
“ all the certainty, the compactness, and the richness of
“ material, which are indispensable if it is to become
“ a generally-recognised standard to which the awards
“ of all arbitrators are henceforward invariably to conform. Nevertheless it is not only capable of indefinite
“ improvement, but the true paths to this improvement
“ are obvious to all. One chief bane in the upward
“ course of International Law, especially of late years,
“ has been the narrow and indiscriminate patriotism of
“ some of the writers who are authorities upon it. It
“ is no part of the writer on International Law to lend
“ himself unscrupulously to defend the policy and traditions of his own country and to abuse the conduct of
“ his country's enemies. If any man ought to be an
“ universal neutral, surely it is the exponent of International Law; and he is the truest patriot who best
“ points out to the statesmen of his own country what
“ is the true road to right,—not he who abets them in
“ all they do, careless whether it be right or wrong.

“ The gradual improvement of International Law,
“ both in its substance and in its form, especially when
“ undertaken by the joint and harmonious enterprise of
“ competent students in all countries, will thus tend
“ to supply an essential condition to the more habitual
“ use of arbitration. All that conduces to familiarize
“ the populations of different States with each other's
“ modes of thought and feeling similarly equalises the
“ moral standard and thus tends in the same direction.

“ It appears then that the adoption of a general
“ system of arbitration presupposes States to have been
“ completely transmuted from political rivals into actual
“ legal equals; that the obstacles to the immediate
“ adoption of such a system, though they seem now to
“ be insuperable, are nevertheless removable in the
“ future by the action of general and modifiable causes;
“ and that the rapidity of this action may be greatly

[“accelerated by conscious and well-directed political provision. Among the conditions essential to the general and successful use of arbitration, the only one which can be ameliorated by direct effort is that which concerns the improvement of International Law both in substance and form. It need not be said that insistence upon a recourse to arbitration in all matters to which it is already confessedly applicable must, even as things are, do much to enlarge its range, and progressively to remove the obstacles which continue to withstand its universal adoption.”]

Arbitration, indeed, can only apply to questions of law or of fact which have already become matters of honest dispute. Even were all existing sources of discord and sentiments of rivalry between States obliterated, there must always remain questions of mutual convenience and arrangement to be from time to time adjusted. The settlement of such questions, if possible by anticipation, is the appropriate task of diplomacy which may hereafter become indefinitely improved in moral tone, and admit of greatly increased publicity. Questions of fact or of law honestly disputed will, it may be hoped, be more and more readily referred to fair and acceptable tribunals of arbitration. All other questions will, as the recognised equality between States progresses, become less numerous and significant, though the time will never come when they can be superseded altogether any more than, in the society of private persons, all the questions of competing interests to which industrial and commercial enterprise gives rise can be superseded by the action of courts of justice.—ED.]

[APPENDIX.]

THE LAW OF NATIONS AND ENGLISH LAW ON THE RECEPTION AND TREATMENT OF FUGITIVE SLAVES IN SHIPS OF WAR.

In the *United Service Gazette* of August 21st, 1875, the following announcement was made :—

Reception of Fugitive Slaves on board H.M.'s Ships.—The Lords Commissioners of the Admiralty have been pleased to issue the following instructions with reference to the question how far officers in command of her Majesty's ships are justified in receiving on board fugitive slaves who, escaping from their masters, may claim the protection of the British flag :—

“ 1. Cases of this kind may be divided into three classes :—
“ Where slaves come on board a ship or boat in harbour, or
“ within territorial waters, either to escape from the alleged
“ cruelty of their masters or to avoid the consequences of their
“ misdeeds. Where the British ship or boat is on the high
“ seas, and the refugee slave, escaping, perhaps, from a vessel
“ also at sea, would be in danger of losing his life were he not
“ received on board. Where a person has been detained on
“ shore in a state of slavery and, escaping to a British ship or
“ boat, claims British protection on the ground that he has
“ been so detained contrary to treaties existing between Great
“ Britain and the country from the shores of which he escapes,
“ as in the case of territories which, like Oman, Madagascar,
“ and Johanna, are partially free.

“ 2. The broad rule to be observed is that a fugitive slave
“ should not be permanently received on board any description
“ of ship under the British flag unless his life would be
“ endangered if he were not allowed to come on board. The
“ reason for this rule is that, were it otherwise, the practical
“ result would be in the first instance to encourage and assist

[“a breach of the law of the country, and next to protect the person breaking that law. And a contrary rule would lead to endless disputes and difficulties with the legal masters of slaves; for it might happen, to take an extreme instance, that the whole slave portion of the crews of vessels engaged in the pearl fishery in the Persian Gulf might take refuge on board British ships, and if free there their masters would be entirely ruined, and the mistrust and hatred caused in their minds would be greatly prejudicial to British interests.

“3. Such being the general and broad rule, it remains to apply it, as far as possible, to the three classes of cases mentioned above. In the first class the slave must not be allowed to remain on board after it has been proved to the satisfaction of the officer in command that he is legally a slave. In the second, the slave should be retained on board on the ground that on the high seas the British vessel is a part of the dominions of the Queen; but when the vessel returns within the territorial limits of the country from a vessel of which the slave has escaped, he will be liable to be surrendered on demand being made supported by necessary proofs. In the third class, a negro might claim protection on the ground that, being by the terms of a treaty free, he was nevertheless being detained as a slave. It would then become the duty of the commanding officer to satisfy himself as to the truth of this statement, and to be guided in his subsequent proceedings in regard to such person by the result of his inquiries and the law which would then affect the case. Those interested in maintaining the slavery of the person claiming his freedom should assist at the inquiry; and in the event of his claim being established the local authorities should be requested to take steps to ensure his not relapsing into slavery.

“4. As a general principle care should be taken that slaves are not misled into the belief that they will find their liberty by getting under the British flag afloat, or induced by the presence of a British ship to leave their own ships if at sea, or their employment if on shore.

“5. When surrendering fugitive slaves commanding officers should exercise their discretion in endeavouring, according to the circumstances of each case, to obtain an assurance that the slaves will not be treated with undue severity.

“6. A special report is to be made of every case of a fugitive slave seeking refuge on board one of her Majesty's ships.

“7. The above instructions are also to be considered part of the general Slave Trade Instructions, and to be inserted at page 29 of that volume, with a heading of ‘Receipt of Fugitive Slaves.’”

There are several questions raised by the terms of this

[circular which are of considerable importance, both from a national and international point of view, and it is not surprising that the circular attracted considerable attention and greatly roused popular indignation in this country. The result was an early notification that the circular was "suspended;" and there can be little doubt that,—in spite of the assurance of Lord Derby, the Foreign Secretary, to the effect that it was issued on the advice of the highest legal authority,—it will be, or has already been, withdrawn.

Some of the propositions, either explicitly or implicitly made in the circular, are directly in the face of the most firmly established principles of the Law of Nations and of the Law of England; others are, at the best, of most questionable validity; and all of them are couched in language and illustrated by arguments which betray an amount of active sympathy with the policy of slave-holding States notoriously repugnant to the most cherished sentiments of Englishmen and to the spirit of a line of decisions in British Courts of Justice.

First, with respect to the case of a fugitive slave taking refuge in a British ship or boat on the high seas. The popular notion abroad is that such a slave becomes *ipso facto* a freeman, and can no more be surrendered to his former master (except in the case of an alleged crime provided for by an extradition treaty) than an English citizen can be surrendered to the government of a foreign State. That this common belief is founded on good legal authority may be proved from the reiterated assertions of judges of the highest eminence, of whom Lord Mansfield, Mr. Justice Holroyd, and Mr. Justice Best may be cited as specimens. The language of these two latter judges, in delivering judgment in the case of *Forbes v. Cochrane*,* may be held not only to be the justification, but to have supplied the very form, of the popular notion. In this case it appeared that during the war with America, in 1815, Sir Alexander Inglis Cochrane was commander-in-chief of the English squadron off the coast of Georgia. A proclamation had been issued inviting negroes from the coast to come on board the English ships for the purpose of emigrating to British territory. A number of negro slaves took advantage of the invitation, and the action was brought to recover 3,400*l.*, the alleged value of thirty-four of these, who had escaped on board his Majesty's ship *Terror*, and had been subsequently landed at Bermuda.

Mr. Justice BAYLEY narrowed the discussion of the subject to the strictly technical points of law as applicable to all the facts of the case.

* 2 Barnewall & Cresswell's Reports, p. 448.

[Mr. Justice HOLROYD in the course of his judgment said :
 " In this case the fugitives did not escape to any island belong-
 " ing to England, but they went on board an English ship
 " (which for this purpose may be considered a floating island),
 " and in that ship they became subject to the English laws
 " alone. They thus stood in the same situation in this respect
 " as if they had come to an island colonized by the English.
 " It was not a wrongful act in the defendants to receive them ;
 " quite the contrary. The moment they got on board the
 " English ship there was an end of any right which the plain-
 " tiff had by the Spanish laws acquired over them as slaves.
 " They had got beyond the control of their master, and beyond
 " the territory where the law recognizing them as slaves
 " prevailed. They were under the protection of another
 " power. . . . When they got out of the territory where they
 " became slaves to the plaintiff, and out of his power and con-
 " trol, they were, by the general law of nature, made free,
 " unless they were slaves by the particular law of the place
 " where the defendant received them. They were not slaves
 " by the law which prevailed on board the British ship-of-
 " war."

Mr. Justice BEST in the course of his judgment said :—
 " The question is, were those persons slaves at the time when
 " Sir G. Cockburn refused to do the act which he was desired
 " to do ? I am decidedly of opinion that they were then no
 " longer slaves ; the moment they put their feet on board of a
 " British man-of-war, not lying within the waters of East
 " Florida (where undoubtedly the laws of that country would
 " prevail), those persons who before had been slaves were free.
 " The defendants were not guilty of any act prejudicial to the
 " rights which the plaintiff alleges to have been infringed.
 " Those rights were at an end before the defendants were
 " called upon to act. Slavery is a local law ; and, therefore, if
 " a man wishes to preserve his slaves let him attach them to
 " him by affection, or make fast the bars of their prison, or
 " rivet well their chains, for the instant they get beyond the
 " limits where slavery is recognized by the local law they
 " have broken their chains, they have escaped from their
 " prison, and are free. These men when on board an English
 " ship had all the rights belonging to Englishmen, and were
 " subject to all their liabilities. If they had committed any
 " offence they must have been tried according to English laws.
 " If any injury had been done to them they would have had a
 " remedy by applying to the laws of this country for re-
 " dress. . . . So far as this question is concerned, there
 " is no difference between an English ship and the soil of
 " England ; for are not those on board an English ship as

[“ much protected and governed by the English laws as if they stood upon English land? . . . It has been said that Sir G. Cockburn might have sent them back. He certainly was not bound to receive them into his own ship in the first instance, but having done so, he could no more have forced them back into slavery than he could have committed them to the deep. . . .

“ Slavery is a relation which has always in British courts been held inconsistent with the constitution of the country. “ It is a matter of pride to me to recollect that, whilst economists and politicians were recommending to the legislature the protection of this traffic, and senators were forming statutes for its promotion, and declaring it to be a benefit to the country, the judges of the land, above the age in which they lived, standing upon the high ground of natural right, and disdaining to bend to the lower doctrine of expediency, declared that slavery was inconsistent with the genius of the English constitution, and that human beings could not be the subject-matter of property. As a lawyer, I speak of that early determination when a different doctrine was prevailing in the senate with a considerable degree of professional pride. . . . The place where the transaction took place was, with respect to this question, the same as the soil of England. Had the defendants detained these men on board their ships near the coast of England, a writ of *habeas corpus* would have set them at liberty. How then can an action be maintained against these gallant officers for doing that of their own accord, which, by process of law in a British court of justice, they might have been compelled to do?”

It will have been seen from the judgment of Mr. Justice Best that he makes a significant exception for the case of a British man-of-war “lying within the waters of East Florida, “where, undoubtedly, the laws of that country would prevail.” This brings us to the next case, placed in the “first class” in the Admiralty circular, that of “slaves coming on board a ship “or boat in harbour, or within territorial waters.” In this case the slave “must not be allowed to remain on board after it has “been proved to the satisfaction of the officer in command that “he is legally a slave.”

The exact amount of independence, in respect of criminal jurisdiction, enjoyed by a ship-of-war in a foreign harbour is notoriously matter of considerable dispute. In previous parts of this work it has been pointed out how delusive are the analogies suggested by the term “extraterritoriality” as applying to ships (pp. 275, 276), and by the term “dominion,” as exerciseable over the sea bordering the coast-line (p. 119),

[and the recognized practice in reference to rights of jurisdiction over ships-of-war in a foreign harbour have been adverted to. In the leading American case of the *Schooner Exchange* (Cranch's Reports, VII., 135—147), the whole subject was discussed with great minuteness and impartiality. The Supreme Court of the United States, in giving its judgment adverse to the right of jurisdiction claimed by the American government, said "that the situation of a public ship was in all respects different from that of a private ship. A public ship constitutes a part of the military force of the nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without seriously affecting his power and his dignity. The implied licence, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seemed to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rule of hospitality."

There is no doubt that this judgment contains a correct exposition of the general law and practice. Dr. Woolsey (p. 81) states the acknowledged position of a public vessel both tersely and exactly: "Public vessels are not only public property, built or bought by the government, but they are, as it were, floating barracks, a part of the public organism, and represent the national dignity, and on these accounts, even in foreign ports, are exempt from the local jurisdiction. . . . It is on account of the crew rather than of the ship itself that they have any territorial quality. Take the crew away, let the abandoned hulk be met at sea, it now becomes property and nothing more." Accordingly a foreign government could not claim as of customary legal right the surrender of a fugitive slave on board a ship-of-war in its harbour apart from the operation of an extradition treaty, though it may be that by the English law a fugitive slave could not claim, as against a British captain, who was intent (for whatever reason) on surrendering him, the rights of protection due to an English citizen. But it is one thing to discourage, either through courtesy to a friendly slaveholding state or for private convenience, the general reception of fugitive slaves, or even to permit them or other persons to be excluded from the ship in the case of urgent necessity, and it is quite another thing to proceed in excess of all legal obligation, and to prescribe a regular judicial process in order to ascertain, as between a foreign refugee and a *soi-disant* master or competing masters, that the refugee is what is called a "legal

[slave," for the purpose, if found so, of formally surrendering him to his "legal" owner. It is the first time since the general abolition of slavery in the British dominions—and it is to be hoped the last—that the captains of British men-of-war have been formally instructed not merely to recognize and countenance slavery in other countries as a legal "status," but to co-operate actively with the slaveholder in preventing his claims being casually evaded. (See the cases on the general subject collected in Broom's Constitutional Law, *Somerset's case*. See also Ortolan's *Règles Internationales*, ed. 1864, Vol. I., p. 200 : "*Ce droit d'exterritorialité est au contraire plein et entier pour les navires de guerre, et on ne trouve pas d'exemple de l'exercice d'une juridiction étrangère sur ces navires entrant dans les ports qui leur ont été ouverts. Ils y sont même, généralement, exempts de la visite des douanes, quoique, à vrai dire, cette visite ne constitue pas un acte de juridiction.*") Since the above was in type, "Historicus" (Sir W. V. Harcourt) has expressed himself to the same effect, and made a valuable *résumé* of cases and opinions in support of his position. See the *Times* for November 4th, 1875.—ED.]

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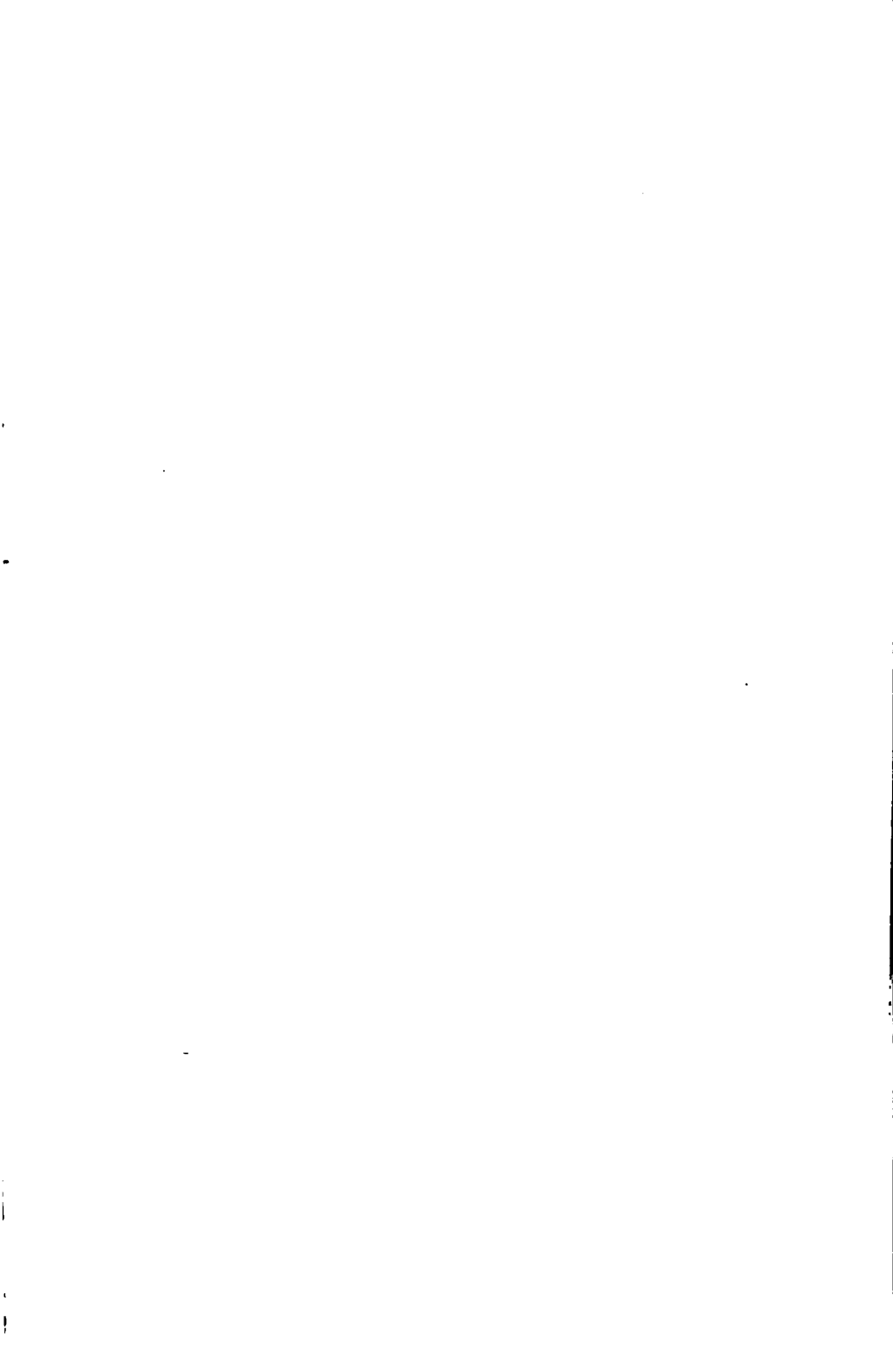
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